In the Supreme Court

Appeal from the Court of Appeals
Owens, P.J., and Sawyer and White, JJ.

THE ESTATE OF MARGARETTE F. EBY,
DECEASED, BY ITS PERSONAL REPRESENTATIVE,
DAYLE TRENTADUE,
Plaintiff-Appellee,

v.

Docket Nos. 128623, 128624, 128625

MFO MANAGEMENT COMPANY,
Defendant-Appellant,

and

BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, SHIRLEY GORTON, LAURENCE W. GORTON, JEFFREY GORTON, VICTOR NYBERG, TODD MICHAEL BAKOS, and CARL L. BEKOFSKE,
AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
RUTH R, MOTT, DECEASED,
Defendants.

BRIEF OF DEFENDANT-APPELLANT MFO MANAGEMENT COMPANY

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I. Judicially-created discovery rules contravene the accrual statute, MCL 600.5827.

> Negligence-based wrongful death claims "accrue" when the "*wrong upon which the claim is based was done.*" MCL 600.5827. Suit must be filed within three years of accrual, MCL 600. 5805(10), subject to generous savings act provisions that add up to potentially another three years for timely suit. MCL 600.5852. Can judicially-created discovery rules be grafted on to MCL 600.5827 without contravening it?

The trial court essentially answered this question "yes."

The Court of Appeals answered "yes."

The Plaintiff Estate contends the answer is "yes."

Defendant MFO Management Company submits that the correct answer is "no."

II. No judicially-created discovery rule for "third party" criminal act cases

> The Estate argues MFO managed the property for Mott and should have prevented Eby's 1986 murder. It sets the accrual date at 2002, when the police solved the crime and the murderer was identified as an employee of Defendant Buckler, a sprinkler service company allowed onto the premises. Should a post-death discovery date be permitted to stall accrual of such a "third party" criminal act claim?

The trial court answered this question "yes."

The Court of Appeals answered "yes."

The Plaintiff Estate contends the answer is "yes."

Defendant MFO Management Company submits that the correct answer is "no."

II. If a discovery rule applies, the claim accrued too early for this suit to be timely

> After a break-in not long before Eby was murdered, she complained about lax security. As she had before, Eby demanded a security alarm system. Mott refused. Eby's Estate sued MFO

shortly after the police identified her murderer as a sprinkler service employee allowed access to Eby's gatehouse basement. Assuming a discovery rule applies, is suit timely given that Eby complained about security issues even before her murder?

The trial court answered the questions half "yes" and half "no," by granting summary disposition in MFO's favor on the count for failure to provide adequate security but denying it on the count for allegedly allowing the murderer access to Eby.

The Court of Appeals answered "yes" as to all counts against MFO.

The Plaintiff Estate contends the answer is "yes."

Defendant MFO Management Company submits that the correct answer is "no."

IV. MFO's vicarious liable for Nyberg and Bakos

The Estate claims MFO is vicariously liable for Nyberg and Bakos, the men who allegedly gave Eby's murderer access to the gatehouse to service sprinklers. Their affidavits say they were Mott employees who MFO did not hire, supervise or direct. The Estate presented no evidence to support its respondeat superior claim, even though the summary disposition motions were pending for more than one year. Should MFO's motion have been denied on a "discovery is incomplete" rationale?

The trial court answered the question "yes."

The Court of Appeals answered the question "yes."

The Plaintiff Estate contends the answer is "yes."

Defendant MFO Management Company submits that the correct answer is "No."

STATEMENT OF JURISDICTION AND ORDERS BEING APPEALED

This Court has jurisdiction under MCR 7.301(A)(2), which permits "review by appeal . . . after decision by the Court of Appeals," and under MCR 7.302(B)(5) and (C)(2), which provide for appeals to this Court from Court of Appeals decisions. This court granted leave to appeal in its July 19, 2006 order.

Defendant MFO Management Company's Application for Leave to Appeal was granted from the Michigan Court of Appeals' March 24, 2005 opinion that reversed Genesee County Circuit Court Judge Robert M Ransom's order granting in part and denying in part MFO Management Company's motion for summary disposition. See Court of Appeals' Opinion (*Apx 129a*) and Trial Court October 28, 2003 Opinion and Order granting summary disposition (*Apx 120a*). A copy of the trial court docket entries appear at *Apx 1a.* The Court of Appeals docket entries are at *Apx 10a.* See also, the Court of Appeals order granting leave to appeal (*Apx 128a*).

STATEMENT OF FACTS

a. Overview

In recent years, police departments and forensic science have combined to solve a number of heinous but "cold" crimes, some as old or older than the 1986 murder that spawned the present wrongful death action filed in 2002. In 1986, Dr. Margarette Eby was murdered inside a gatehouse she rented on the Mott Estate in Flint. Five years later a Northwest flight attendant (Nancy Lutwig) was murdered in a hotel near Metro Airport. The crimes were both solved in 2002. Police used new DNA testing methods and learned one man killed both women, used advanced technologies to assemble a 16 year old bloody print from the Eby crime scene, put the print through new databases to locate a match, and surreptitiously secured a sample of the identified suspect's DNA. All of this resulted in defendant Jeffrey Gorton's arrest and his eventual convictions.

Sixteen years after Jeffrey Gorton murdered Dr. Eby, her Estate sued Gorton along with a host of defendants it alleges negligently failed to prevent him from killing Dr. Eby. As for MFO Management Company ("MFO"), the Estate claims it owed duties to keep tenant Eby safe, in general, and safe specifically from Jeffrey Gorton. It turns out Gorton was a lawn service employee (and son of the owners) of defendant Buckler Automatic Lawn Sprinkler Company ("Buckler"). He was given admittance to the basement of Eby's rented gatehouse to service the Estate's sprinkler system. Eby was last seen alive two days later. In another two days, her body was found. She was murdered sometime between November 7th and 9th, 1986.

Eby's estate filed suit 16 years later, on August 2, 2002. In addition to suing the convicted murderer (Jeffrey Gorton) and his parents (Shirley and Laurence Gorton) and the murderer's employer (Buckler Automatic Lawn Sprinkler Company), it also sued Eby's now-

deceased landlord (the Estate of Ruth R. Mott), two then-employees of Ruth Mott (Victor Nyberg and Todd Michael Bakos), and the company the Estate argues functioned as Mott's management company (MFO Management Company). The Estate's complaint is set forth in many counts, but the gist of it is that Jeffrey Gorton murdered Eby and everyone else should have somehow prevented him from doing it.

The non-perpetrator defendants sought summary disposition on statute of limitations grounds. MFO also challenged the factual premises of the respondeat superior claim against it because Nyberg and Bakos were not its employees, as their uncontradicted affidavits explained. The trial court granted summary disposition on one of the substantive counts and denied it on the rest. The case entered the Court of Appeals on grants of four Applications for Leave. The Court of Appeals applied a common law-created discovery rule to all aspects of the Estate's claims against all the defendants. All of the Estate's claims, against all of the defendants, were allowed to go forward (including the respondeat superior claim against MFO).

b. The underlying facts related to the murder and the police investigation that eventually led to defendant Jeffrey Gordon's arrest and conviction.

Dr. Margarette Eby moved to Flint in 1981. That year, she leased the two-story gatehouse located near the entrance to the Ruth R. Mott estate.[1] The gatehouse basement contained the valves and piping that supported the entire estate's sprinkler system.[2]

Eby's life in the gatehouse was marred by incidents of criminal activity even before she was murdered in early November, 1986. On January 23, 1985, Dr. Eby wrote to Mrs. Mott to inform her about disturbing breaches of security at the gatehouse and to ask her landlord to

[1] First Amended Complaint, ¶ 1, *Apx 32a.*
[2] *Id.*

remedy the situation. She described a break-in, late at night on January 23, 1985, while she was home. Her letter began:

> Dear Mrs. Mott:
>
> Shortly after midnight on January 23, the cottage was illegally entered while I was in my bedroom and my compact disc player and purse were stolen. I called Robert Bowden from my bedroom after I heard a noise downstairs and he called the police. Four squad cars responded to the call. The report on file with the police department is numbered 2363.[3]

Eby reminded Mrs. Mott of other breaches of security at the gatehouse: "You will recall, Mrs. Mott, that this is *not the first time such an incident has taken place* since I have been [a] resident in the gate house" [emphasis added]. She also reminded Mrs. Mott that she had previously asked for installation of an alarm system and she repeated her demand for one:

> *I requested then, and repeat the request **with great urgency***, that a security alarm system be installed immediately in order to protect my person and property against possible future violations.[4]

She wrote as if with prescient vision, given the horrific crime that would befall her later:

> I stress that the relative isolation of the cottage, far removed from neighbors or passersby, make the risk to a criminal slight while ***my vulnerability is high.***
>
> I request you[r] kind and speedy attention to this important matter.[5]

Paul Yager, then chief executive officer of MFO Management Company, responded to Eby's letter, relaying Mrs. Mott's decision, already orally conveyed to Eby, that no alarm system would be installed. Yager's January 27, 1986 letter mostly advised Eby to take personal responsibility for her safety:

> While Mrs. Mott regrets the occurrence of last Wednesday night, it seems apparent that no system would have prevented your loss when

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[3] *Apx 55a.*
[4] *Id* [emphasis added].
[5] *Id* [emphasis added].

> the keys to make the system effective were left in your unlocked car in front of the house. Further, when you leave the gate open frequently and fail to provide visual security through drapes, curtains or blinds, unnecessary temptation to unwelcome intruders is evident.[6]

Ruth Mott decided not to install the alarm system Eby wanted, though Mott did decide to install new deadbolt locks:

> This will confirm your telephone conversation with Dora on Friday where she said that Mrs. Mott has no plans to install an electronic security system in the cottage. She has, however, installed a deadbolt lock on each outside door.
> * * *
> Mrs. Mott hopes that with new locks, the above suggestions and your own prudent efforts, there will not be a recurrence.[7]

Late in the evening on November 7, 1986, Eby returned to the gatehouse after a dinner party. Two friends walked her to her door and "waited until she was safely in her home before leaving."[8] That was the last time anyone except the killer saw her alive. Eby was attacked, raped and knifed to death. Her body was discovered on November 9, 1986.[9]

Flint police officer David King, the primary officer in charge of the homicide investigation, filed an affidavit in response to the defense statute of limitation motions for summary disposition. His affidavit briefly describes the early weeks and months of the investigation. He reports that the department preserved and collected evidence from the crime scene.[10] It obtained a partial fingerprint from a faucet in the cottage. It removed the faucet from the crime scene and preserved it. "DNA evidence was obtained from Eby's body."[11] Officer

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[6] *Apx 56a.*
[7] *Id.*
[8] First Amended Complaint, ¶2, *Apx 32a.*
[9] *Id*, ¶3, *Apx 32a.*
[10] Affidavit of King, ¶3, *Apx 73a.*
[11] First Amended Complaint, ¶4, *Apx 32a.*

King explains that the department interviewed potential suspects who knew Eby as well as others who the department simply regarded as suspicious persons:

> [The police] conducted numerous interviews, pursuing any and all leads that appeared promising. Flint Police *investigators interviewed a number of persons who appeared to be suspicious* ***because of their lifestyle*** or relationship with Margarette Eby, however none of these suspicions were confirmed, because there was never a time when evidence could be developed implicating such persons in the homicide.[12]

Actually, there did come a time when such evidence developed but justice in terms of finding Dr. Eby's killer was delayed for many, many years. It would have to await the development of more sophisticated DNA testing, the murder of Northwest flight attendant Nancy Ludwig in 1991, improved fingerprint technologies and improved and computerized fingerprint data bases. As plaintiff's complaint puts it well and succinctly: "The crime was never solved and the case remained a mystery for nearly 16 years."[13]

Eby's son seems to have been the first to recognize the grotesquely brutal similarities between his mother's murder and flight attendant Ludwig's murder. Alerted to those similarities, police labs eventually conducted additional DNA testing on evidence collected from both victims and determined that one man killed both women. More sophisticated fingerprint lifting techniques were brought to bear on the partial print from the faucet removed from the gatehouse. That yielded a match to Jeffrey Gorton, then living an apparently quiet life in Florida. A police surveillance operation followed and Gorton's DNA sample was retrieved by testing performed on a cup Gorton used at a restaurant. That sample matched the DNA samples retrieved from his victims.

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[12] Affidavit of King, ¶ 3, *Apx 73a.*
[13] First Amended Complaint, ¶4, *Apx 32a.*

On February 8, 2002, Jeffrey Gorton was arrested and charged with Eby's murder.[14] Gorton's murdering days were ended. He pled no contest to the charge of murdering Eby on January 6, 2003.[15] He is currently serving a life sentence for his crime.[16]

On August 2, 2002, Dr. Eby's Estate filed a wrongful death complaint against a plethora of parties it contends negligently failed to keep Eby safe. When Gorton murdered Eby, he was an employee of his parents' lawn service company: Buckler Automatic Lawn Sprinkler Company.[17] Buckler performed sprinkler maintenance at the Mott estate, uneventfully, at least from 1981, five years before the killing.[18] Jeffrey Gorton was hired by his parents' company "in 1985 or 1986."[19] By then, he had been convicted of "an assault crime in the state of Florida" and had served time in a Florida prison. The Estate alleges that Gorton's parents knew of this criminal history when they sent their son onto the Mott estate to winterize the sprinkler system on November 7, 1986.[20] Even assuming Gorton's parents knew of his criminal past (which is now known to be a contested fact), how Ruth Mott was supposed to find that out or her employees (Nyberg and Bakos) or MFO Management Company is unexplained.

On November 5, 1986, two days before Dr. Eby was last seen alive, Buckler arrived to perform the sprinkler winterization.[21] The Estate's complaint alleges that "Bakos, acting at the direction of his supervisor, Nyberg" unlocked the door to the "common area" in the gatehouse basement and allowed Gorton access to the sprinkler controls.[22] The complaint says that no one

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[14] Trial court opinion, p 2, *Apx 121a.*
[15] *Id.*
[16] *Id,* p 1, n1, *Apx 120a.*
[17] First Amended Complaint, ¶7, *Apx 33a.*
[18] *Id,* ¶5, *Apx 33a.*
[19] *Id,* ¶7, *Apx 33a.*
[20] *Id,* ¶8, *Apx 33a-34a.*
[21] *Id,* ¶13, *Apx 35a.*
[22] *Id.*

stayed to supervise Gorton, or stayed to observe his movements, or stayed to see whether he "created a method of re-entering the common area" later. It is claimed that Nyberg and Bakos failed to lock the "door to the gatehouse" after Gorton left or alternatively failed "to see that the premises were secure."[23] Plaintiff contends that on the evening of November 7, 1986, Gorton re-entered the basement, "gained access to the living quarters occupied by Eby" and assaulted, raped and murdered her.[24]

The complaint alleges that the Flint police investigation was re-opened "sometime in 2001."[25] They were "aware that technological improvements may provide some new leads" so they "submitted certain DNA evidence for new analysis and comparison with other potential suspects." In addition, fingerprint evidence retrieved from the gatehouse's faucet was sent to "national data bases to match this evidence with any potential suspects."[26] The new DNA evidence matched the DNA evidence recovered from the 1991 Ludwig murder scene. The fingerprints match those preserved from Jeffrey Gorton's Florida arrest and conviction.[27] DNA evidence was "surreptitiously" obtained from Gorton[28] and arrest, charging and conviction followed.

The Estate's wrongful death lawsuit contains the following counts:

- Count I: Buckler Automatic Lawn Sprinkler and Jeffrey Gorton's parents negligently breached their duty to conduct an "adequate preemployment investigation" of their son or, if they did, they negligently disregarded the "threat or potential threat" he posed "to customers."

- Count II: Jeffrey Gorton's parents negligently breached a duty to properly supervise their son/employee.

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[23] *Id*, ¶14, *Apx 35a-36a.*
[24] *Id*, ¶15, *Apx 36a.*
[25] *Id*, ¶16, *Apx 36a.*
[26] *Id.*
[27] *Id*, ¶17, *Apx 36a-37a.*
[28] *Id*, ¶18, *Apx 37a.*

- Count III: Jeffrey Gorton's parents negligently breached a duty not to retain employees who they knew or should have known posed a possible threat of harm to others by virtue of being admitted to enter customer's homes.

- Count IV: Jeffrey Gorton's parents are vicariously liable, based on respondeat superior, for the fact that their son/employee murdered Dr. Eby.

- Count V: Jeffrey Gorton was duty-bound not to assault or kill Dr. Eby.

- Count VI: Ruth Mott, Bakos, Nyberg and MFO Management Company negligently breached a duty "to prevent unsupervised access to the common areas below [the gatehouse]."

- Count VII: Nyberg and Bakos were employees of "Ruth R. Mott and/or MFO" and they are vicariously liable, based on respondeat superior, for the fact that Nyberg's and Bakos' allegedly somehow permitted Gorton to re-enter the premises and murder Dr. Eby.

- Count VIII: Ruth Mott and MFO "owed a duty...to provide adequate security to prevent reasonably foreseeable harm" and the alleged negligent breach of that duty proximately caused Jeffrey Gorton to murder Dr. Eby.

c. ***The trial court's opinion***

Each party filed a summary disposition motion that raised statute of limitation issues. MFO's motion also challenged the legal sufficiency of the respondeat superior count. By late September 2002, all the defenses motions were filed. The Estate responded to all the motions by papers dated October 11, 2002.[29] The hearing on the motions was held on March 13, 2003.[30] Genesee County Circuit Court Judge Robert M. Ransom ruled on the pending motions in his opinion released October 28, 2003. While the parties first waited six months for the hearing and then waited another seven months for the ruling, all discovery any party wanted to take proceeded unimpeded.

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[29] Trial court docket entry 26, *Apx 3a.*
[30] 3/13/03 hearing transcript, *Apx 79a-119a.*

Judge Ransom said he rejected plaintiff's effort to activate a discovery rule. He reasoned that the Estate knew enough about the potential claim so that discovery tolling was unavailable:

> This Court rejects Plaintiff's "discovery rule" analysis. * * * Michigan case law provides that "the tolling provision is not available to a plaintiff who knew or should have known about the existence of the claim and the plaintiff's [sic] potential liability." *McCluskey v Womack*, 188 Mich App 465, 472-473 (1991). Furthermore, the Michigan Supreme Court has established that the specifics of the evidence needed to prove the claim need not be known; the only requirement to preclude tolling of the statute of limitations is that the plaintiff knew the claim existed. *Eschenbacher v Hier*, 363 Mich 676, 682 (1961).[31]

Judge Ransom saw the question of whether accrual of the claim could be stalled awaiting the identity of the killer was separate from applying a discovery rule. He wrote that "a claim for personal injury accrues when all of the elements are present and can be properly pleaded in a complaint," citing *Connelly v Paul Ruddy*, 388 Mich 146, 150 (1972) and *Grimm v Ford Motor Co*, 157 Mich App 633, 638 (1986). He wrote: "This court recognizes, in some instances, [that the] identity of the killer may be necessary to plead a cause of action."[32]

With the exception of Count VIII (against MFO and Ruth Mott premised upon a generalized duty to keep Eby safe) the defense statute of limitation motions were denied. As to each count against each non-perpetrator defendant, the trial court ruled that not knowing who killed Eby prevented plaintiff from either knowing that a party had breached any duty and/or impeded knowledge of the causation component of the Estate's claim.[33]

The trial court decided that Count VIII against MFO and Mott, which pled a generalized duty to provide adequate security, was different and he found the limitation period expired pre-suit:

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[31] Trial court opinion, p 4, *Apx 123a.*
[32] *Id.*
[33] *Id.* See concluding line of each count-by-count discussion in the opinion, *Apx 123a-125a.*

> Plaintiff should have known that this cause of action existed at the time of Margarette Eby's repeated requests for security and that this resulted in Jeffrey Gorton's gaining access to Margarette Eby's home and subsequently attacking and killing her.
>
> Plaintiff should have known that this cause of action existed at the time of Margarette Eby's murder in 1986. Although the identity of the killer was not known, Plaintiff should have recognized in 1986 that the security provided by the Estate of Ruth R. Mott and MFO was inadequate, thereby allowing *someone* access to the premises to attack and kill Margarette Eby.[34]

MFO's Motion for Summary Disposition as to its alleged respondeat superior liability was supported by affidavits from Nyberg and Bakos[35] that documented the lack of any employer/employee or principal/agent relationship with MFO. They testified that, before the murder, they were both *Mott's* employees and that MFO did not hire, supervise or direct them. The Estate provided no evidence to rebut the affidavits. Nevertheless, the trial court denied MFO's motion directed to respondeat superior liability, saying only that there was "little discovery" so far and that the motion was "premature prior to completion of discovery."[36]

d. The Court of Appeals proceedings and grant of leave by this Court

This case moved into the Court of Appeals by leave granted to MFO, the Buckler group of defendants, the Ruth Mott's Estate, and the Eby Estate.[37]

The Court of Appeals panel, consisting of Judges Owens, Sawyer and White issued an unpublished per curiam opinion. The Court of Appeals affirmed the trial court opinion as to denial of defense summary disposition motions and reversed the MFO "win" on Count VIII dealing with its failure to provide adequate security.

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[34] *Id*, p 6, *Apx 125a*.
[35] Nyberg affidavit, *Apx 27a-28a*; Bakos affidavit, *Apx 29a*-30a.
[36] Trial court opinion, p 8, *Apx 127a*.
[37] Court of Appeals order, *Apx 128a*.

The panel wrote first about the claims against Buckler, the Gortons, Nyberg and Bakos. Because their relationship to the killer "could not be discovered by plaintiff, under the circumstances of this case, until Jeffrey Gorton was determined to be the killer, or the means of access of Eby's killer into her residence was determined"[38] the panel decided the Estate could not earlier have been aware of a possible cause of action against them. The panel also rejected the defendants' argument that discovery rules do not stall accrual dates while plaintiffs are awaiting knowledge of the defendant's identity:

> This is not a case where plaintiff knew of an injury and its cause, but did not know the identity of the actor. Plaintiff knew that Eby was murdered, but did not know that anyone had caused Eby harm other than the killer. Plaintiff could not have known of a cause of action against anyone in Buckler's, the Gortons,' Nyberg's or Bakos' positions until the facts of the murder were uncovered.[39]

The panel found that a discovery rule accrual date would apply to these defendants who had at least a somewhat direct relationship to the killer. It was impressed that what unfolded in the wake of the killer's identification was "objective and verifiable evidence to support application of the discovery rule."[40]

The panel next turned to Mott and MFO. It wrote that the "police theorized that a personal relationship existed between Eby and her killer because there was no sign of forced entry."[41] In fact, Officer King testified that his department investigated not only people who knew Eby but also strangers who the police merely found suspicious "because of their life

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[38] Court of Appeals opinion, p 5, *Apx 133a.*
[39] *Id.*
[40] *Id.*
[41] *Id*, pp 5-6, *Apx 133a-134a.*

style."[42] Without even acknowledging that the Estate had sued MFO for generalized failure to keep her safe (Count VIII) the panel applied a discovery rule to all claims against MFO.

Eby died inside leased premises, after break-in incidents were reported to her landlord, and after her complaints about claimed lax security and her request for installation of a security alarm system had allegedly gone unheeded. Admittedly, no security alarm system was installed. Such a system might have prevented the murder, for example by causing an alarm to sound, by causing Gorton to select a more vulnerable victim, or by giving Eby herself a chance at sounding the alarm. But the panel decided no causal link existed as to MFO and Mott sufficient to plead a claim, until the killer was identified:

> Until Jeffrey Gorton was implicated in the murder, there was no indication that Eby's killer was a stranger and, even with the exercise of reasonable diligence on the part of the police department, there was no causal connection between Eby's murder and any breach of duty by Mott or MFO. See *Lemmerman, supra*, p 66, quoting *Moll, supra*, p 16. Therefore, the court should have determined that the discovery rule applied instead of improperly granting summary disposition to Mott and MFO.[43]

Next the panel considered MFO's respondeat superior argument. It affirmed the trial court's denial of summary disposition, despite plaintiff failing to come forward with any evidence. It held that "continuing discovery could provide a reasonable opportunity to find or uncover factual support for plaintiff's assertions."[44]

The per curiam opinion was released unpublished. Plaintiff's motion to permit publication was granted.[45]

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[42] King Affidavit, ¶ 3, *Apx 73a*.
[43] Court of Appeals opinion, p 6, *Apx 134a*.
[44] *Id*, p 7, *Apx 135a*.
[45] Court of Appeals docket entries, 50, 52, *Apx 13a*; see *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297; 701 NW2d 756 (2005).

On July 19, 2006 this Court granted MFO's Application for Leave to Appeal, as well as Defendants' Buckler and Shirley and Laurence Gorton's Application. The parties were directed to include the follow issues in their briefs:

> [W]hether the Court of Appeals application of a common law discovery rule to determine when plaintiff's claims accrued is inconsistent with or contravenes MCL 600.5827, and whether previous decisions of this Court, which have recognized and applied such a rule when MCL 600.5827 would otherwise control, should be overruled.

STATEMENT OF STANDARDS OF REVIEW

Issues of statutory construction are questions of law that this Court reviews *de novo*. *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 739; 641 NW2d 567 (2002)

Whether summary disposition should have been granted is a question appellate courts review *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 599 NW2d 817 (1999). A *de novo* standard of review applies to grant of a statute of limitation summary disposition motions presenting questions of law. *Lindsey v Harper Hospital*, 455 Mich 56, 60 n2; 564 NW2d 861 (1997); *Boyle v General Motors*, 468 Mich 226, 229; 661 NW2d 557 (2003).

ARGUMENT I

Negligence-based wrongful death claims accrue when the "*wrong upon which the claim is based was done.*" MCL 600.5827. Suit must be filed within three years of accrual, MCL 600. 5805(10), subject to generous savings act provisions that add up to potentially another three years for timely suit. MCL 600.5852. Judicially-created discovery rules cannot be grafted onto MCL 600.5826 without contravening it.

a. How limitation periods are supposed to work in wrongful death cases

"The period of limitation in a wrongful death action is governed by the statute of limitations applicable to the underlying claim." *Miller v Mercy Memorial*, 466 Mich 196, 202; 644 NW2d 730 (2002) This estate sued in negligence. MCL 600.5805(10) sets a three-year limitation period for non-malpractice wrongful death negligence actions and sets the statute of limitation clock running on the date of the death:

> The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

MCL 600.5852, the savings act, creates a generous additional period for an estate to timely sue so long as its decedent died before the period of limitation ran (or within 30 days of its running). In Eby's case, depending on the date a personal representative was appointed, MCL 600.5852 potentially granted the Estate six years from the date of the murder to timely file suit against anyone whose negligence allegedly caused it. The statute provides:

> If a person dies before the period of limitation has run or within 30 days after the period of limitation has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within two years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within three years after the period of limitations has run.

The purpose of §5852 is "to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions." *Miller, supra* at 203, quoting *Lindsey v Harper Hospital*, 455 Mich 56, 66; 564 NW2d 861 (1997). The statute "extends the otherwise-applicable limitation periods for wrongful death actions." *Waltz v Wyse*, 469 Mich 642, 644 n2; 677 NW2d 813 (2004). It "provides an exception to the otherwise-applicable limitation periods by permitting the personal representative of a decedent's estate to file a wrongful death action up to two years after letters of authority are issued, subject to a three year ceiling." *Waltz* at 646. "As an exception to the statute of limitations, the savings provision should be strictly construed." *Lindsey, supra* at 65, citing *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984).

b. MCL 600.5827 establishes the accrual rules that set the three-year clock running

Our Legislature has answered the question of when the Eby Estate's claim accrues. MCL 600.5827 sets the accrual date and starts the limitation period running when the wrong was done:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections ***the claim accrues at the time the wrong upon which the claim is based was done*** *regardless of the time when damage results*. [Emphasis added]

It is accepted by all parties that none of the specialized accrual statutes in sections 5829 to 5838 apply to the Estate's claim.[46] This means that the Estate's claim "accrues at the time the wrong upon which the claim is based was done." The latest date when the wrong was done was early November 1986, when Eby was murdered.[47] Unlike certain other statutes that establish when claims accrue,[48] *this one has no discovery rule.*

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[46] MCL 600.5829 governs accrual on claims to enter on and recover land. §5831 pertains to actions brought to recover the balance due upon a mutual and open account. §5833 governs actions for breach of a warranty of quality or fitness. §5834 relates to actions involving common carriers. §5835 concerns actions on life insurance contracts. §5836 governs claims on installment contracts. §5837 relates to alimony payments. §5838 pertains to claims based on non-medical malpractice. §5838a concerns claims based on medical malpractice.

[47] In fact, the record documents security-related wrongs done even earlier, when Mott/MFO failed to install the security alarm Eby demanded after her peace was disturbed, ten months before she was killed, when an intruder entered her home and stole her purse and other items.

[48] MCL 600.5838(1) sets accrual in non-medical malpractice "at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose" and §5838(2) then creates an alternative timely filing as reckoned by a six month discovery rule. MCL 5838a(1) sets accrual for a medical malpractice claim "at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim" and §5838a(2) then allows timely filing under a statutory discovery rule. MCL 600.5833 *specifies* that a claim for breach of warranty accrues at the time the breach is discovered. Claims against architects and contractors may be brought six years after the time of occupancy or one year after the defect is discovered. MCL 600.5839. In actions by shareholders or actions against limited liability companies, suit must be filed within three years after the cause of action accrues, or within two years after discovery of the cause of action, whichever occurs first. MCL 450.1489(f); MCL 450.4515(e). In other words, the Legislature has demonstrated it knows how to create a discovery rule when it wants one.

c. *The MCL 600.5827 accrual rule must be applied as written*

"A bedrock principle of statutory construction is that a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Rakestraw v Gen Dynamics Land Sys*, 469 Mich 220, 224; 666 NW2d 189 (2003). "When the statutory language is unambiguous, the proper role of the judiciary is to simply apply the terms of the statute to the facts of a particular case." *Rakestraw, supra* at 224, citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

The primary purpose of statutory interpretation "is to ascertain and effectuate legislative intent." *Omne Fin, Inc, v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). In accord, e.g., *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 482; 673 NW2d 739 (2003). But "the words of a statute provide the most reliable evidence of its intent[.]" *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). See also *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004) ("[T]he language of the statute is the best source for determining legislative intent."), *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005) (a court's goal is to "give effect to the intent of the Legislature by reviewing the plain language of the statute") *Rakestraw, supra* at 224 ("Courts may not speculate regarding legislative intent beyond the words expressed in a statute"). Court are supposed to give the Legislature's words their common, ordinary meaning. *Pohutski v Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). It is a "fundamental principle of statutory construction" that "'a clear and unambiguous statute leaves no rule for judicial construction or interpretation'," *Kenneth Henes Special Products v Cont'l Biomass*, 468 Mich 109, 113 (2002), quoting *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993).

"[W]here the statutory language is clear and unambiguous, the statute must be applied as written." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). "If the statute is unambiguous on its face, the Legislature is presumed to have intended the meaning plainly expressed and further judicial interpretation is not permitted." *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 545-546; 683 NW2d 200 (2004). Presented with clear and unambiguous words, there is nothing to interpret and this Court applies statutes just as their words require. *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005).

In *Vega v Lakeland Hosps*, 267 Mich App 565; 705 NW2d 389 (2005), the panel appropriately echoed this Court's recent cases. It stressed that courts do not make laws: "[We] keep in mind that the wisdom of a statute is for the Legislature to determine and that the law must be enforced as written." *Id.* at 570. This Court does not inquire into the knowledge, motives, or methods of the Legislature, and may not construe a statute on the basis of a policy different from that chosen by the Legislature. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 752; 641 NW2d 567 (2002); *Fowler v Doan*, 261 Mich App 595, 599; 683 NW2d 682 (2004).

These rules apply with equal force to statutes of limitation. In *Gebhardt v O'Rourke*, 444 Mich 535, 546; 510 NW2d 900 (1994), for example, this Court applied what it called a "literal interpretation" of a statute of limitations. If there are conflicts in limitation statutes, the guiding principle is that what "best reflects the Legislative intent [is] expressed in the words of the statute of limitations." *Joliet v Pitoniak*, 475 Mich 30, 40; 715 NW2d 60 (2006).

As this Supreme Court cautioned in *Lansing v Lansing*, 356 Mich 641, 648; 97 NW2d 804 (1959), "The mere fact a statute appears impolitic or unwise is not sufficient for judicial construction but is a matter for the Legislature." "Because the proper role of the judiciary is to

interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute." *Koontz v Ameritech,* 466 Mich 304, 312; 645 NW2d 34 (2002).

d. How our courts have struggled to keep MCL 600.5827 from meaning what it says

MCL 600.5827 was enacted as part of the Revised Judicature Act of 1961, which went into effect in 1963. 1961 PA 236. "Prior to the adoption of the RJA, it was settled that a cause of action accrues at the moment when the plaintiff could first commence a lawsuit upon it." *Connelly v Paul Ruddy's Co*, 388 Mich 146, 148; 200 NW2d 70 (1972). The statute caused a good bit of early consternation as courts struggled to avoid the statute's clear meaning.

In *Prosch v Yale*, 306 F Supp 524 (ED Mich 1969), a products liability case, the District Court bemoaned the Legislature's choice of the word "wrong," believing it to be of indefinite meaning. "A less fortunate choice of words for triggering the running of the cause of action could hardly have been made." *Id* at 525. It mused that it was possible that the statute could mean "exactly what it says," but it thought that would be "little short of ridiculous." The court declared that the statute was not completely "an exercise in futility," because it might be used in misrepresentation or business tort cases. *Id.*

The District Court writing in *Crocker v McCabe-Powers Auto Body Company*, 321 F Supp 1154, 1156 (ED Mich 1970) pondered, "[w]hy did the legislature use the word 'wrong' rather than injury? The court can only conjecture that it was because Section 5827 applies to both persons and property." *Id* at 1156. It thought that "[t]he intention of the statute is to bar claims where because of their peculiar circumstances the damages may not occur until sometime after the injury or wrong is inflicted." *Id.* It imagined an "atomic radiation blast" where some injuries might not be felt until years later. *Id.* It struggled to push its own vision of square pegs

into the Legislature's round holes: "When Section 5857 states that the claim accrues when the wrong is done, it seems to me that the Legislature is saying that the claim arises when the tort is done, as the tort has been defined by judicial decision under the common law." *Id* at 1158.

In *American States Insurance Company v Taubman Company*, 352 F Supp 197, 201 (ED Mich 1972), the court ended up deciding that the statute must create serial accrual dates depending on the parties' relationship to the loss. It thought that the word "wrong" must mean "actionable wrong." From that it somehow reasoned that where a fire started because of negligently installed wiring, the claims of the lessee's insurers would not accrue until the fire occurred, but "in cases where parties have been dealing with each other, and a wrong is done and some damage results, the cause of action accrues at that time rather than later when damages are markedly increased." *Id* at 201.

The early resistance to the statute's meaning became institutionalized once basically ignoring it was sanctioned by Michigan's appellate courts. As summarized in *Larson v Johns-Manville*, 427 Mich 301; 399 NW2d 1 (1986) such cases as *Connelly v Paul Ruddy's Co*, 388 Mich 146, 151; 200 NW2d 70 (1972) wrestled §5827 into oblivion by deciding "that the 'wrong' which triggers accrual under §5827 is not the date of the breach of duty, but the date on which an injury results from that breach." *Larson* at 309. Playing with the date the wrong occurred is not a big enough fib to avoid the effect of the statute in this case, but in many cases it has served the plaintiff's interest sufficient to preserve the claim.

Chase v Sabin, 445 Mich 190; 516 NW2d 60 (1994) is a 1960's era ordinary negligence claim against a nurse and a hospital where this Court applied a discovery rule. Surveying earlier cases, the Court described the "limited circumstances" and "appropriate instances" when discovery rules supply discovery-grounded accrual dates "despite" the language of §5827. *Id* at

195, 196. It observed that, since *Connelly, supra* at least, the statute has been interpreted against the common meaning of its words out of "necessity...because an opposite interpretation could potentially bar a plaintiff's legitimate cause of action before the plaintiff's injury." *Chase* at 196. Such an approach does not square with this Court's respect for the words of the Legislature.

The lone early appellate case that applied the statute the way it was written seems to be *Cree Coaches v Panel Suppliers, Inc*, 23 Mich App 67, 70-71 (1970), aff'd on other grounds by 384 Mich. 646 (1971). It looked at the word "wrong" and gave it its literal meaning.

> Admittedly, this statute is inartfully worded and somewhat arcane, testing one's common sense in that the result can be one where a claim is stale when a plaintiff has yet had no opportunity to bring an action. Yet any other reading which might result in a statute of limitations longer than three years must be to torture the language and ascribe a different legislative intent where none is apparent.

However, applying the statute as written was anathema to this Court in 1971. While affirming on other grounds, this Court directed that the Court of Appeals ruling on the statute of limitations issue ("the accelerated judgment issue") "should be regarded as obiter dicta and not accorded the force of adjudication." *Cree Coaches* at 384 Mich 650.

The main preoccupation of the courts who have fought this statute's clear meaning has been with its last phrase, which states that accrual dates are not dependent on "when damage results." That perceived "problem" with the statute is not what is inconsistent with application of a discovery rule in the present case. Both "the wrong...was done" and the "damage result[ed]" so long ago that any disconnect between the two concepts will not potentially salvage the timeliness of this Estate's claim. The "problem" for this Estate is that if accrual of the claim cannot await a discovery date and, instead, the limitations clock must start ticking when the wrong was done, the plain meaning of the statute means the Estate cannot wait until the killer

was identified to sue for MFO's alleged failure to keep Eby safe (generally or specifically from Jeffrey Gorton).

e. If this Court jettisons judge-made discovery rules, it will not be the first state Supreme Court to do so.

Other states have also rejected any discovery rule that is not expressly stated in the applicable statute of limitation.

Ohio holds that there is no discovery rule in negligence cases because the Legislature provided a discovery rule for certain types of cases, but did not provide a general discovery rule. *Investors Reit One v Jacobs,* 546 NE2d 206 211 (Ohio S Ct 1989); *Grant v Thornton v Windsor House*, 566 NE2d 1220, 1222-23 (Ohio S Ct 1991). This rejection of a judge-made discovery rule was based on the discovery rule contained in Ohio's fraudulent concealment statute, which is akin to Michigan's fraudulent concealment statute. *Id.*

Oregon also has abandoned judge-made discovery rules. *See, Gladhart v Oregon Vineyard Supply*, 26 P3d 817, 819 (Or S Ct 2001) ("a discovery rule cannot be assumed, but must be found in the statute of limitations itself"). The Oregon Supreme Court stressed that the accrual statute did not say that the running of the limitations period depended on discovery or reasonable discovery, and there were specific statutes providing versions of discovery rules, so that the Legislature "demonstrated its ability to express a discovery rule." *Id. Accord, Towne v Robbins,* 331 F Supp2d 1269 (D Ore 2004).

Florida also holds that the date when plaintiff discovered or should have discovered the claim is irrelevant when the Legislature did not provide that discovery triggered the limitations period. *See, Davis v Monahan*, 832 So2d 702, 711 (Fl S Ct 2002) (no discovery rule in the

absence of an applicable statutory provision expressly providing for such postponement of a limitation period); *Raie v Cheminova*, 336 F3d 1278, 1281 (11th Cir 2003) (in accord)..

f. This Court should return Michigan's accrual of claims rule to where MCL 600.5827 put it: no discovery rules unless the Legislature enacts them.

"[T]he statute of limitations is not a disfavored plea but a perfectly righteous defense." *Moll v Abbott Laboratories*, 444 Mich 1, 17 n19; 506 NW2d 816 (1993) quoting *Bigelow v Walraven*, 392 Mich 566, 570; 221 NW2d 328 (1974). It is "a valid defense that should be available to defendants and construed by courts as specifically provided by the Legislature." *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984).

To this point, with rare exceptions, our courts have either ignored the obvious import of MCL 600.5827 or have twisted its meaning. Defendant asks this Court to return Michigan to the path the Legislature chose: only the Legislature creates discovery rules.

ARGUMENT II

Even if this Court decides that common law discovery rules survive to delay accrual dates, despite MCL 600.5827, such a rule should not be available to stall accrual of "third party" criminal act claims. Such a rule disserves the public policy of protecting repose and preventing stale lawsuits. There should be no discovery rule when non-perpetrator defendants are accused of failing to prevent crimes that others committed.

a. Despite MCL 600.5827, accrual dates have sometimes been set by judicially-created discovery rules based on considerations of public policy

In *Larson v Johns-Manville*, 427 Mich 301; 399 NW2d 1 (1986), the plaintiffs secured a discovery rule accrual date for their slow-blooming asbestos exposure injuries. This Court would not bar asbestos-containing product liability actions "before a plaintiff knew or should

have known of the disease." *Id* at 304. Before activating a discovery rule to delay the accrual date in such cases, the *Larson* court engaged in a public-policy analysis that considered whether plaintiffs would be sufficiently encouraged to pursue claims diligently and whether defendants would be adequately protected from having to defend against stale or fraudulent claims.

The analysis used in *Larson* to judicially create a discovery rule has been used in other cases as well. *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963), released prior to enactment of now-governing statutes, held that a medical malpractice claim did not accrue until the patient discovered or should have discovered the wrongful act. *Williams v Polgar*, 391 Mich 6, 25; 215 NW2d 149 (1974) would not allow a limitation period to begin to run until the plaintiff "knows or should have known" of the negligent misrepresentation. In the product liability context the same rule exists and a claim does not accrue until "plaintiff discovers or in the exercise of reasonable diligence should have discovered his loss." *Parish v B F Goodrich*, 395 Mich 271, 281; 235 NW2d 570 (1975). This rule was extended to pharmaceutical products liability actions in *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993), where this Court rejected the plaintiff's argument for a subjective, rather than an objective, standard for discovery.

The *Moll* court explained that adopting discovery rules is a case-by-case, public policy-sensitive decision that must pay more than lip service to legislative enactments:

> This Court has recognized specific situations in which the discovery rule must be utilized to prevent unjust results. [cites omitted] While we have provided judicial relief to plaintiffs whose actions would be barred by the statute of limitations through no fault of their own, we will not encourage and cannot allow a plaintiff to sleep on an objectively known cause of action. *Moll* at 17.

In *Moll*, as in *Larson*, the discovery rule applied and the claim accrued "when, on the basis of objective facts, the plaintiff should have known of an injury, even if a subjective belief regarding the injury occurs at a later date." *Moll* at 18.

In *Chase v Sabin*, 445 Mich 190; 516 NW2d 60 (1994), the court concentrated on public policy concerns to gloss over the meaning of the term "wrong" as used in §5827. It acknowledged that statutes of limitation further "the sound public policy of establishing a time frame beyond which defendants will not be forced to defend." *Id* at 200. But, it was more impressed that doctors' "questionable acts of which patients are unaware and which are followed by silence" did not make a good case for adherence to §5827. *Id.* It also wrote that the defendants were "in a superior position to recognize the occurrence of a negligent act," since they "generally control the evidence, as well as the plaintiff's knowledge of the evidence." *Id.* The *Chase* Court commented that its "sense of fair play" figured into the decision to create a discovery rule that set the accrual date. *Id.*

b. The public policy imperatives in the "third party" criminal act context should compel this Court to resist creation of a discovery rule.

Not every plaintiff who needs to delay accrual of its claim has found this Court ready to rely on perceptions about sound public policy to overwhelm the statutes the Legislature enacted. As a result, not every plaintiff who needs one gets a discovery rule. *Boyle v General Motors*, 468 Mich 226; 661 NW2d 557 (2003) presented the question of "whether an action for fraud accrues under MCL 600.5827 at the time the wrong was done, or whether it accrues on the date the plaintiff knew or should have known of the fraud or misrepresentation." This Court decided that §5827 ruled. The six-year statute of limitation began to run when the wrong was done. "The discovery rule has been adopted for certain cases." *Id* at 231. But to apply a discovery rule

to a fraud claim would "ignore[] the plain language of MCL 600.5813 [the six year limitation] and 600.5827." *Id* at 232. "If the language of a statute is clear, no further analysis is necessary or allowed." *Id* at 229 citing *Pohutski, supra at 683*. Following *Boyle*, see *Laura v DaimlerChrysler*, 269 Mich App 446, 450-451; 711 NW2d 792 (2006) (Michigan Consumer Protection Act claim).

In *Stephens v Dixon*, 449 Mich 531; 536 NW2d 755 (1995) this Court rejected a plaintiff's appeal to a discovery rule in an auto accident case. Plaintiff urged that until her condition developed into a serious impairment of body function twenty months after the accident, her claim was not discovered (nor should it have been). In arguing to stall the accrual date, plaintiff relied on the fact that an auto accident negligence claim does not exist in the absence of one of the threshold injuries. That fact was correct but not persuasive. This Court wrote that if it were to treat the threshold injury as an element of the cause of action it would "corrupt the purposes of the statute of limitation," *id* at 540, and infringe upon legislative prerogatives:

> [I]f we were to treat serious impairment of body function as a fifth elements in motor vehicle actions, we would effectively disavow our proper role vis a vis the Legislatures. It is the duty of this Court to give effect to the intention of the Legislature in passing its enactments. *Wymer v Holmes*, 429 Mich 66, 76; 412 NW2d 213 (1987). *Stephens,* at 541.

To adopt a discovery rule would improperly plague the Courts and defendants with stale claims; *Stephens* at 540-541:

> Potential defendants of such suits would be denied the benefit of repose, since the rise of an injury to the threshold level could take many years, even decades. Moreover, the cost in judicial resources would also increase. In order to promote finality and prevent overburdening of our judicial resources, we cleave to the general principle that the discovery of an injury, not its attainment of some

> threshold status, commences the running of the statute of limitations.

In *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995) this Court also declined to accept a "repressed memory syndrome" discovery rule for a childhood sexual abuse claim. The "devices presently available to this Court to allow actions beyond the statutory limitation period are inappropriate vehicles by which to allow these claims to survive a statute of limitation challenge." *Id* at 77. "The more appropriate forum for resolution of the question" was "the legislative arena." *Id.*

In the course of denying access to a discovery rule, the *Lemmerman* Court surveyed its prior discovery rule cases. From this survey it culled some guiding principles that propelled it to reject plaintiff's argument. When common law discovery rules have been applied to "extend the statute of limitations, the dispute between parties has been based on evaluation of a factual, tangible consequence of action by the defendant, measured against an objective external standard." *Id* at 68. The presence of such an external standard was said to adequately address concerns about reliable fact finding and the absence of such an external standard in repressed memory cases left the Court "defer[ring] to the Legislature." *Id* at 68, 80.

In *Stephens, supra* at 536, this Court acknowledged that discovery rules place "an important limit on a mechanical and unjust termination of a legitimate cause of action" but it was also was impressed that there "can be equitable problems with the imposition of the discovery rule." In weighing the competing interests, a court must consider "whether defendant's equitable interests would be unfairly prejudiced by tolling the statute of limitations." *Id.* Not all plaintiffs with a late-blooming understanding of the pieces of their litigation puzzle snag themselves a discovery rule:

> While it may be harsh to bar the action of a plaintiff who, through no fault of his own, did not discover his injury until after the running of the statute, it is also unfair...to compel a defendant to answer a charge arising out of events in the distant past. The discovery rule tends to undermine the sense of security that the statute of limitations was designed to provide, namely, that at some point a person is entitled to put the past behind him and leave it there.[49]

Garg v Macomb County Community Mental Health, 472 Mich 263; 696 NW2d 646 (2005) is also instructive. There this Court rejecting a "continuing violation" limitation period under the Civil Rights Act, MCL 37.2101 *et seq*. Such a rule was inconsistent both with the three year limitation period of MCL 600.5805(10) and with MCL 600.5827. "To allow recovery for such claims is simply to extend the limitations period beyond that which was expressed by the Legislature." *Id* at 658. While the social cost of strict construction of statute of limitation accrual rules means that some injuries will go unredressed: "That is a cost of *any* statute of limitations, but nonetheless a cost that the Legislature apparently believes is outweighed by the benefits of setting a deadline on stale claims." *Id* at 659, n 8.

The Court of Appeals has also had occasion to apply the plain meaning of MCL 600.5827 to deny access to a discovery rule and to resist an appeal to special circumstances being sufficient to overwhelm the statute: *Scherer v Hellstrom*, 270 Mich App 458, 463 n2; 716 NW2d 307 (2006) [accrual of a breach of contract claim regarding payment of future proceeds of a home sale will not await discovery of the news that the home was sold]; *Williams v Wendel*, unpublished opinion per curiam of the Court of Appeals, decided March 2, 2006 (Docket No. 263309), ***Addendum A*** [discovery rule inapplicable to personal injury claim against contractor who caused toxic mold condition, given failure to "demonstrate a verifiable basis for (plaintiff's)

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[49] *Stephens*, *supra* at 536, quoting Olsen, *The Discovery Rule in New Jersey: Unlimited Limitation on the Statute of Limitations*, 42 Rutgers L R 205, 211-212 (1989) [as edited in *Stephens*].

inability to bring their claim within the three year period" and "extension of the limitation period will hamper defendant's ability to defend the action"]; *In re Jarvis C. Webb*, unpublished opinion per curiam of the Court of Appeals, decided January 24, 2006 (Docket Nos. 263759, 263900, 263901), ***Addendum B*** [discovery rule inapplicable to breach of fiduciary duty claim because "the language of MCL 600.5827 is clear and unambiguous that a claim accrues when the wrong is committed, not when it is discovered, unless it falls within §§5829 to 5838]. See also, *Raimondo v Myers*, 2005 U.S. Dist. LEXIS 24643 (ED, Mi, 2005) [the one year libel limitation period "accrues from the time of publication, even though the person defamed has no knowledge of the publicaction. MCL §600.5827"), ***Addendum C***.

The Eby Estate presents a "third party" criminal act case, where an injured party tries to shift liability for a criminal assailant's violent act to someone other than the one who committed the crime. See, e.g., *Williams v Cunningham Drug Stores*, 429 Mich 495; 418 NW2d 381 (1988); *Scott v Harper Recreation*, 444 Mich 441; 506 NW2d 857 (1993) [both finding claims brought by invitees against merchants defective on public policy grounds]. However, in the 1970's this Court permitted landlords to be sued if they created conditions that invited third parties to commit violent crimes against their tenants. See, *Johnson v Harris*, 387 Mich 569; 198 NW2d 409 (1972); *Samson v Saginaw Professional Building*, 393 Mich 393; 224 NW2d 843 (1975).

All such cases are fraught with difficult causation proofs centering on the unforeseeability of harm and on the effect of intervening superseding criminal acts. These cases clearly push the edge of the litigation envelope and are stuffed with difficult public policy considerations about whether we are, indeed, our brother's keeper.

If a discovery rule exists in this context, as the Court of Appeals now says it does, consider the numbers of stale claims that await the courts and non-assailant defendants. Medical forensics can be expected to continue to advance as a science. As police investigation techniques advance, each television season's episodes of "Cold Case Files,"[50] and each long-delayed solving of a crime, will be scrutinized about whether identifying the perpetrator also identifies some other potentially responsible non-perpetrator. The facts of this case are obviously highly eccentric and the likelihood of a closely analogous case may seem remote. But crimes are arguably negligently facilitated by many persons tangentially involved in the life of a violent offender. Not only employers of assailants are at risk, but everyone from doctors who fail to assure assailants are properly medicated to teachers who fail to properly ameliorate learning disabilities to parents and other relatives who should have seen "it" coming but failed to intervene.

The notion that discovery of a claim can be postponed—indefinitely apparently—until newly developed scientific methods shed light on who killed someone is unprecedented in the case law and promises maximum disruption in terms of civil litigation. A non-perpetrator's repose should not be disturbed merely because sophisticated DNA testing and new fingerprinting technologies, combined with tenacious police work, eventually identified a murderer.

Even if this Court (or some of its members) decides that judge-made discovery rules can co-exist with MCL 600.5827, MFO still asks this Court to rule that there is no discovery rule applicable here. MFO should not be required to try to defend itself decades after Dr. Eby's murder, when access to evidence is extremely compromised. The Eby Estate was required to sue

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[50] In fact, this case was featured on one such television show and was also the subject of the book "*Blood Justice: The True Story of Multiple Murder and a Family's Revenge* (St. Martin's True Crime Library), Tom Henderson.

MFO, if at all, no later than three years after her murder, as potentially extended to six years via the savings act. By 2002 when this lawsuit was filed, sixteen years after Jeffrey Gorton murdered Margarette Eby, MFO was "entitled to put the past behind [it] and leave it there." *Stephens, supra* at 536.

ARGUMENT III

Even if a discovery rule exists and even is it applies to "third party" criminal act cases, the Estate's complaint was not timely. All elements of the claim existed and could have been properly pled long before three years pre-suit. The causative link between failed security and Eby's murder inside the gatehouse was known or should have been before then. Discovery could not await knowing the identity of the murderer.

Connelly, supra establishes the conceptual groundwork for when our courts will create discovery rules out of a sense of "fair play." Its core principles are recited, for example in *Stephens* (the serious impairment case rejecting a discovery rule) and in *Larson* (the asbestos injury case accepting a discovery rule). As *Connelly* was summarized in *Stephens, supra* at 539, it is said that "a cause of action for tortious injury accrues 'when all the elements of the cause of action have occurred and can be alleged in a proper complaint'." There are four such elements, *id*:

(1) The existence of a legal duty by defendant toward plaintiff.

(2) The breach of such duty.

(3) A proximate causal relationship between the breach of such duty and an injury to the plaintiff.

(4) The plaintiff must have suffered damages.

a. Alleging duty and breach of duty: the cause of action "possibilities" as contrasted with "likelihoods"

When *Johnson v Harris*, 387 Mich 569; 198 NW2d 409 (1972) was released, it created a duty, under some circumstance, for landlords to protect tenants from the criminal acts of third parties.[51] A tenant was assaulted by someone who lurked in the poorly lit, unlocked vestibule of the defendant's apartment building. The Court accepted that an intentional crime is a superseding cause of harm even where a defendant's negligence creates an opportunity for its commission. But that is not the case if, at the time of a defendant's alleged negligent conduct, he "realized or should have realized that such a situation might be created and that a third person might avail himself of the opportunity to commit" such a crime. *Johnson* at 574.

Not long after *Johnson* came *Samson v Saginaw Professional Building*, 393 Mich 393; 224 NW2d 843 (1975). It expanded a landlord's duty into the context of commercial buildings. The plaintiff worked for a tenant in defendant's building. A mental health clinic also leased space in the building. One of the clinic's patients attacked plaintiff. There had been prior security complaints lodged on account of the patients. The *Samson* majority grounded the cause of action in a landlord's duty to keep common areas "in good repair and reasonably safe for the use of his tenants and invitees," *id* at 407, and expressed the duty owed in expansive terms:

> The existence of this relationship between the defendant and its tenants and invitees placed a duty upon the landlord to protect them from unreasonable risk of physical harm. *Id* at 407.

On January 23, 1986, less than ten months before she was murdered, Dr. Eby complained about the most recent security breach at her gatehouse. She suffered the harrowing experience of being home, late at night, when a burglar entered and stole her purse and a CD player. She made

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[51] Plaintiff does not contend that MFO was Eby's landlord. The Estate accepts that Ruth Mott was the landlord.

an eloquent plea to Mrs. Mott for "kind and speedy" attention to this serious security breach, writing that it was not the first time such an incident occurred. She wrote that she was again requesting that "a security alarm system be installed immediately."[52] Four days later, Mott refused Eby's request for an alarm system.[53] Under the known circumstance of a tenant, murdered inside her leased premises, who pleaded with her landlord to install a security alarm system after being repeatedly victimized by criminal activity inside her rental housing, and given such cases as *Johnson* and *Samson*, a claim of negligent breach of the duty to provide a safe premises could have been pled immediately after the murder. The Estate did not need to know who killed Eby to bring such a claim.

b. General principles applicable before discovery rules stall accrual dates

Moll, *supra* carefully examined what a plaintiff must know to establish an accrual date as set by a discovery rule. The majority, *supra* at 24, quoted approvingly to *Kroll v Vanden Berg*, 336 Mich 306, 311; 57 NW2d 897 (1953) to emphasize that discovery rules are set into motion even without a plaintiff knowing the details of a claim:

> It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecution or preserving his claims.

The *Moll* majority, *supra* at 22, adopted the "possible" cause of action standard:

> A plaintiff's cause of action accrues when he discovers or, through the exercise of reasonable diligence, should have discovered that he has a *possible* cause of action. [Emphasis added]

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[52] *Apx 55a.*
[53] *Apx 56a.*

Moll at 22 emphasized that knowledge of a "possible" (as contrasted with a "likely") cause of action was aimed at the causation component of a plaintiff's case:

> The term "possible," on the other hand, connotes a lesser standard of information [than "likely"] *needed to provide knowledge of causation*. Black's Law Dictionary defines the term "possible" as:
>
> > Capable of existing, happening, being, becoming or coming to pass, feasible, not contrary to nature of things, neither necessitated nor precluded, free to happen or not, contrasted with impossible. [Emphasis added.]

In other words, "Once a claimant is aware of an injury and its *possible cause*, the plaintiff is aware of a possible cause of action." *Moll* at 24 (emphasis added). In accord, e.g., *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy v Oakwood Hospital*, 454 Mich 214, 223; 561 NW2d 843 (1997). A plaintiff "need not know for certain that he had a claim, or even know of a likely claim" before the discovery rule accrual date is set. *Id* at 221.

"Further, the plaintiff need not be able to prove each element of the cause of action before the statute of limitations begins to run." *Solowy* at 224, citing *Moll* at 21 and *Warren Consolidated Schools v WR Grace*, 205 Mich App 580, 583; 518 NW2d 508 (1994). In *Solowy*, this meant that the plaintiff did not need to know that her injury "was in fact or even likely caused by the defendant doctor's alleged omissions." *Id* at 224. A claim is discovered when a plaintiff possesses "at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id* at 226. In this case, the record shows that Eby asked for and was denied installation of a security alarm system. That is the "minimum level of information" that "suggests a nexus between the injury and the negligent

act." Clearly, Eby's estate knew or should have known, coincident with the murder, that MFO had not kept Eby safe. Having discovered that, only a totally wrong-headed discovery rule would let the Estate wait to sue until the identity of the murderer was discovered 16 years later.

"It is not necessary that the plaintiff recognize that she has suffered an invasion of a legal right" to have discovered a claim. *Heisler v Roberts*, 113 Mich App 630, 635; 318 NW2d 503 (1982). A plaintiff "need not know the details of the evidence by which to establish his cause of action." *Thomas v Ferndale Laboratories*, 97 Mich App 718, 722; 296 NW2d 160 (1980). "A plaintiff must act diligently in discovering his cause of action and cannot simply sit back and wait for others to inform him of his possible claim." *Grimm v Ford Motor*, 157 Mich App 633, 639; 403 NW2d 482 (1986); *Turner v Mercy Hospital*, 210 Mich App 345, 353; 533 NW2d 365 (1995). A cause of action is not held in abeyance until a plaintiff obtains "professional assistance" to determine its existence. *Stoneman v Collier*, 94 Mich App 187, 193; 288 NW2d 405 (1979); *Sedlak v Ford Motor*, 64 Mich App 61, 63; 235 NW2d 63 (1975).

As early as 1981, a "plethora of case law" held that a discovery rule accrual date will not await "discovery of the identity of the alleged tortfeasor where all other elements of the cause of action exist." *Reiterman v Westinghouse*, 106 Mich App 698, 704; 308 NW2d 612 (1981). "[T]he discovery period applies to discovery of a possible claim, not the discovery of the defendant's identity." *Poffenbarger v Kaplan*, 224 Mich App 1, 12; 568 NW2d 131 (1997) overruled in part on other grounds, *Miller v Mercy Memorial*, 466 Mich 196, 198; 644 NW2d 730 (2002). In accord, e.g., *Thomas v Ferndale Laboratories*, 97 Mich App 718, 722; 296 NW2d 160 (1980); *Brown v Drake-Willock International*, 209 Mich App 136, 142; 530 NW2d 510 (1995).

Plaintiff tries to distinguish this line of cases by claiming that, as to the non-perpetrator defendants, it is not a matter of discovery of their identity but rather discovery of their possible link to the killer that should stall a discovery rule accrual date. At least as to MFO, who communicated with Eby in response to her complaint to Mott about alleged security lapses in the months before the murder, the argument is without merit. MFO communicated Mott's "no" answer on Eby's question about installing a security alarm system. This record does not reveal how Jeffrey Gorton gained entry to the gatehouse. That there was apparently no sign of forced entry does not establish that an alarm system would not have thwarted the murderer. Gorton might have set off such an alarm, if it had been in place. He might have not thought Eby a suitable target if the gatehouse was visibly alarmed. Eby herself might have been able to set off the alarm to summon help. Discovery rules will not delay accrual while plaintiffs await the identity of the tortfeasors. Why should a discovery rule suffer awaiting the identity of the tortfeasor "once removed," namely, MFO as some kind of killer who did no killing?

Once a plaintiff has discovered an injury and a possible causal connection between the injury and a defendant's breach of duty the limitations clock starts ticking. *Jackson County Hog Producers v Consumers Power*, 234 Mich App 72, 78; 592 NW2d 112 (1999). And it does not take "much" to create that possible causal connection. In *Stoneman v Collier*, 94 Mich App 187; 288 NW2d 405 (1979) the plaintiffs "were aware that decedent died of carbon monoxide poisoning in a General Motors automobile and could have proceeded against General Motors accordingly." *Id* at 192-193. In *Stoneman,* just knowing the situs of the injury meant that the factors that may legitimately obstruct awareness and accrual of the claim were not demonstrated. In *Reiterman, supra,* plaintiff's decedent received an electrical shock plugging a clothes dryer into a wall socket. The court found "as a matter of law that where a product is the instrumentality

of death the fact that the product may have been defective has been manifested." *Id* at 704-705. In *Lefever v American Red Cross*, 108 Mich App 69; 310 NW2d 278 (1981) the patient knew she had contracted hepatitis from blood platelets but did not know of the Red Cross' "involvement." "Under certain circumstances, mere knowledge of the act will be sufficient" to set the discovery accrual date "because the act alone...gives good reason to believe it was improper." *Id* at 74. This is one such case.

After Eby's home was invaded, including one late night ten months before the murder, she demanded (as she had before) installation of a security alarm system. The record, taking it in a light most favorable to plaintiff at this point, shows Eby received only advice to keep her curtains drawn and a promise of deadbolts. Eby was murdered inside the gatehouse. It does not matter, in terms of MFO's potential liability as a management company vis a vis a tenant, whether the murderer was someone Eby admitted to the gatehouse (willingly or by some artifice) or that it turned out she was murdered by Jeffrey Gorton who was apparently a stranger. This lawsuit claims that MFO can be liable for failing to keep Eby safe—in general and from Gorton in particular. Eby's death, as well as its possible causal connection to an alleged breach of MFO's duty to keep her safe, was known or in the exercise of diligence should have been known coincidental with the murder. A claim that a defendant breached the duty to provide a safe premises is discovered when the criminal's act causes known injury. Accrual of such a claim is not stalled until the police identify the killer.

c. *Michigan civil cases arising out of murders do not support a view that discovery can await knowing who killed Dr. Eby*

One day after the opinion in this case was released, another panel of the Court of Appeals released another unpublished wrongful death statute of limitation case arising out of another

murder: *Smith v Randolph*, unpublished opinion per curiam of the Court of Appeals, decided March 24, 2005 (Docket No. 251066), ***Addendum D***, lv den'd 475 Mich 879; 715 NW2d 774 (2006). The estate of a woman murdered in 1982 sued her husband. He was not convicted of the murder until November of 2001. The wrongful death action was filed in October of 2002. Since the case was "prima facie barred" by the statute of limitation, the "plaintiff had the burden of showing the facts necessary to avoid the operation of the statute of limitation," citing *Warren Consolidated Schools*, *supra* 205 Mich App at 583.

The Smith Estate made an argument, clearly inapplicable here, that the fraudulent concealment statute stalled accrual until two years beyond the conviction date. See MCL 600.5855. The murderer had lied to police, cremated the decedent's body allegedly to further hamper the investigation, and even sued the shopping center where the murder occurred. The Court of Appeals rejected the trial court's mere resort to fraudulent concealment as the mechanism for giving the estate time to sue. "[I]t cannot be said that a plaintiff 'should have discovered...the identity of the person who is liable for the claim' [MCL 600.5855] only at a point in time when a finder of fact is convinced of the person's identity as the perpetrator of crime beyond a reasonable doubt." Fraudulent concealment tolling was rejected as a direct mechanism for preserving the claim as timely, though it figured prominently in the panel's reasoning.

The *Smith* panel relied on *Miller v Mercy Memorial Hospital*, 466 Mich 196; 644 NW2d 730 (2002) [the savings act can be tacked on to a discovery rule] and allowed the savings provision of MCL 600.5852 to piggyback on fraudulent concealment tolling. This appears to be a wrong result given *Waltz v Wyse*, 469 Mich 642, 644; 677 NW2d 813 (2004) [the savings act does not tack on to 182-day notice of intent tolling], a case the panel did not consider. The result

was that fraudulent concealment took timely filing to July of 2000, when defendant was arrested, and the savings act was allowed to do the rest of the work of preserving the Estate's claim.

Significantly, the *Smith* panel reached the *opposite* result as compared to the *Eby* panel in terms of its discovery rule analysis. Even though it would have been difficult to contend that the deceased's son (her personal representative) ought to have discovered what the police had not discovered for eighteen years, namely that his mother's husband killed her, the argument that a discovery rule should save the claim was rejected. After summarizing the core principles about how discovery rules work, the panel blocked plaintiff's access to the rule on exactly the rationale that the *Eby* panel rejected when MFO made the argument:

> Under [the discovery] rule, a claim accrues when, on the basis of objective fact, the plaintiff should have known of a possible cause of action [cite to *Solowy* and *Moll*]. Significantly, the rule does not pertain to discovering the identities of all possible parties. [cite to *Brown v Drake-Willock*]. *Smith* at *8, n2.

The *Smith* panel, unlike the *Eby* panel, understood that the elements of the claim existed and could all be pled in a proper complaint as soon as the decedent was murdered:

> In this case, the elements of the cause of action were apparent when plaintiff's decedent was shot and killed in 1982. Thus, contrary to plaintiff's discovery rule argument, the statute of limitation was not tolled until defendant's identity as the perpetrator was ascertained. *Id* at *7.

Consider as well, *Tebo v Desai*, unpublished opinion per curiam of the Court of Appeals, decided December 15, 2000 (Docket No. 212379), ***Addendum E***. The plaintiff's decedent was murdered in 1983. It was 1995 before his two business partners were charged with the crime. The trial court in the underlying criminal case dismissed the charges but the Court of Appeals reversed and remanded for further proceedings in 1998, *see People v Adams*, 232 Mich App 128; 591 NW2d 44 (1998). The estate sued the partners as well as an entity defendant, apparently the

partners' business. The Court of Appeals decided that the wrongful death action was barred by the statute of limitations. The plaintiffs did not argue a discovery rule rationale but, instead, presented a case for fraudulent concealment tolling. That argument was rejected, but on a rationale that relied heavily on discovery rule principles.

The *Tebo* panel pointed out that such tolling "is not available to a plaintiff who knew or should have known about the existence of the claim and the defendant's potential liability." *Id* at 6. It wrote that "the details of the evidence necessary to prove the claim need not be known; all that is required it that the plaintiff know that the claims exists." *Id.*

d. Murders are spinning off wrongful death actions all over the country, including against those who did not kill but who allegedly negligently facilitated the murder.

All over the country murder cases are turning into civil cases and not only against the murderer but also against third parties an estate claims negligently facilitated the murder. The disparate rationales and results suggest that, if this Court sees fit to recognize a discovery rule (as plaintiff urges) it would need to be one that is reined in and one that would not be satisfied on the present facts.

The plaintiff Estate has relied heavily on *Roycroft v Hammons*, 203 F Supp 2d 1053 (SD Iowa, 2002). The District Court denied summary judgment in a lawsuit filed in 2001 that arose out of a 1993 murder, in a hotel, where there was no sign of forced entry. In 1999, DNA testing linked a former hotel employee to the murder. The employee had access to a master key. He was charged with the murder in 2000 and convicted in 2001. In between those two events the wrongful death action against the hotel was filed. The case makes it clear that Iowa's limitation periods operate very differently from Michigan's. Iowa's statute of limitation is two years and it *is* tolled by operation of a discovery rule. The Iowa federal judge denied the hotel's summary

judgment motion, finding issues of fact about when the cause of action accrued under the discovery rule.

The Ohio courts have faced a similar issue and resolved it rather oddly (and wrongly, defendant MFO submits). In *Collins v Sotka*, 81 Ohio St 3d 506; 692 NE2d 581 (1998) the Ohio Supreme Court ruled that the two year wrongful death statute of limitations would be tolled by a discovery rule. The plaintiff's decedent was a seventeen year old who was murdered in a vacant house. More than two years after the killing, her estate sued the murderer and the owner of the vacant house. The Ohio court was troubled that the family actually had even less than two years to sue because the date of death was established to be the date the teen disappeared, but it was five months before her body was found. The Supreme Court ruled that:

> In a wrongful death action that stems from a murder, the statute of limitations begins to run when the victim's survivors discover, or through the exercise of reasonable diligence, should have discovered, that the defendant has been convicted and sentenced for the murder.

There is no hint in the decision of any Ohio statute akin to Michigan's (death) savings act. The Court spoke passionately about how a discovery rule was needed to assure that murderers will not escape the full force of civil litigation. It did not mention how or why or even whether its rule should apply with equal force to the non-perpetrator homeowner defendant allegedly tortiously linked to the killing.

A Kentucky court has followed the *Collins'* result but rejected its discovery rationale in another civil case arising out of a murder investigation that did not produce a suspect until six years after the murder. *See Digiuro v Ragland*, 2004 Ky App LEXIS 188 (2004) rehearing granted 2005 Ky App LEXIS 118, ***Addendum F.*** Only the murderer was sued. Kentucky's wrongful death statute is one year. The Court declined to adopt a discovery rule, writing that it

could not say "that it would be accurate to expand it to apply in the present matter." However, it preserved the civil claim against the murderer "hold[ing] narrowly" that "the family of a murder victim [may] wait until conviction of a defendant before filing suit" against that defendant. * 21.

Bernoski v Zarinksy, 344 NJ Super 160; 781 A2d 52 (2001) is a wrongful death action, filed against the murderers only, arising out of a police officer's murder in 1958. Forty-one years later, the perpetrators were identified and prosecuted for the crime. The decedent's widow filed the Estate's civil suit against them after indictments issued. The appellate court refused to invoke a discovery rule:

> Plaintiff was aware on the day of the crime that her husband had been murdered. Although she did not know the identity of the perpetrators, the discovery rule ordinarily does not delay the accrual of a cause of action when a plaintiff is aware of the injury and of facts sufficient to attribute the injury to the fault of another, but cannot determine the tortfeasor's identity. [Cites omitted.] *Id* at 56.

Troubled by the result, and with a clear eye focused on the fact that the Estate was suing only the killers, the court applied "equitable tolling" and allowed the civil case to proceed.

Hibbard v Gordon, 118 Wa 2d 737; 826 P2d 690 (1992) is a case arising out of the 1977 rape of one individual plaintiff and the same-day murder of her parents by a man who had been recently released from a state hospital. She sued the state of Washington in 1984, after having read a 1983 newspaper account of her parents killer's criminal case. The trial court ruled that the limitation period had run as to the state and that no discovery rule would apply. The Washington Court of Appeals reversed, held a discovery rule applied, and ruled that there were issues of fact to be resolved. The Supreme Court held that "the discovery rule did not apply to the State in this case and that the negligence action against the State was barred by the 3-year statute of limitations," which began to run on the date of the murders and rape. *Id* at 753.

In *Leo v Hillman*, 164 Vt 94; 665 A2d 572 (1995) the Vermont Supreme Court rejected application of a discovery rule to plaintiff's wrongful death claims (as distinguished from the survival claims). The case involved a 1979 murder. An unmarried couple split up. The man ended up in treatment with the defendant psychologist. The woman joined the sessions on occasion. One night after a session, the man held his former girlfriend at gunpoint until she agreed to reconcile, a fact she made known to the psychologist. The psychologist allegedly discouraged her from reporting the incident to the police. Three weeks later the girlfriend disappeared and, soon after, so did the man. It was 1990 before he was arrested in California. He was extradited back to Vermont, entered into a plea agreement admitting the murder, and led police to the body.

In 1992, thirteen years after the murder, the woman's estate sued the psychologist and his clinic. The Vermont Supreme Court held that the wrongful death claim was not timely because it had not been filed within two years of the death. It held that the accrual date of a wrongful death action was "a determinable fact, and that statutory language, as in numerous other limitations provisions, does not invite further inquiry." *Id* at 575. It rejected the plaintiff's argument that Vermont law "require[s] reading a discovery rule into every limitation provision." *Id* at 98. The "plain language" of the wrongful death statute applied and courts must "resist the temptation to adjust the law on the basis of specific cases." *Id* at 576. The wrongful death act "fixed the accrual date so that discovery can never be an issue." *Id* at 576. "[D]eath—a determinable fact—signals the commencement of the limitation period" under Vermont's wrongful death act. *Id.*

Confusion clearly reigns in the country about the proper rationale for dealing with these wrenching cases. MFO submits that the only "right" result for Michigan, as set forth within

Arguments I-III, is a result that denies the Estate access to any discovery rule. That is the only result that squares with the governing statutes, especially MCL 600.5827, but also including MCL 600.5852. Alternatively, it is the only result that complies with the public policy-infused creation (or not) of discovery rules that has been the deciding factor in many contexts to this point. Finally, if a discovery rule *is* available to the Estate, such a rule is simply not satisfied here. Discovery rules do not await the accrual of every aspect of damage. They do not await the identification of the tortfeasor.

ARGUMENT IV

MFO sought summary disposition as to plaintiff's respondeat superior claim with affidavits from Nyberg and Bakos. They testified that only Ruth Mott, not MFO, employed them and that MFO never supervised or directed their work. Plaintiffs had more than a year to meet MFO's motion with contrary evidence but failed to do so. Both lower courts erred in arbitrarily concluding that MFO's motion was premature because discovery was not complete.

a. Factual Background

When MFO was presented with this lawsuit and its count of vicarious liability, it obtained the affidavits of Victor Nyberg and Todd Bakos Each affiant unequivocally stated that he was employed by Ruth Mott, and not MFO, when this incident occurred. Nyberg further testified that he has "never been an employee of MFO Management Company" and that "MFO Management Company never hired, supervised or directed my work."[54] Bakos stated he "had never been employed by MFO Management Company prior to December 31, 1986" and that

[54] Nyberg Affidavit, *Apx 27a-28a*.

"prior to December 31, 1986, MFO management had never hired, supervised or directed my work."[55]

Plaintiff never refuted these sworn statements. In its initial response to the motion, plaintiff presented its attorney's affidavit, citing MCR 2.116(H), and stating that a response must wait until Nyberg, Bakos, and MFO representatives were deposed and tax and employment records were inspected. Counsel merely vaguely hinted at a discovery plan and then expressed his personal belief that: "the witnesses' testimony and evidence procured will lead to the conclusion that MFO is legally responsible for the actions of Tod Bakos and Victor Nyberg."[56]

Because MFO's motion, filed in September of 2002,[57] was not decided until October of 2003, plaintiff had one full year to conduct the discovery outlined in its attorney's affidavit. In January of 2003, plaintiff received MFO's answers to two sets of interrogatories and MFO's production of documents.[58] Plaintiff never supplemented its response to MFO's motion with any facts established by that discovery.[59] Plaintiff also had every opportunity to take depositions. Plaintiff never supplemented its response to MFO's motion with facts obtained from any such discovery.

Despite the absence of competent evidence after a full year of opportunities for discovery, both lower courts concluded that summary disposition was premature.[60] While citing the proper standard of review announced by this Court in *Maiden v Rozwood*, 461 Mich 109; 597

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[55] Bakos Affidavit, *Apx 29a-30a.*
[56] Binkley Affidavit, *Apx 69a.*
[57] Trial Court Docket Entry 15, *Apx 2a.*
[58] *Id*, Entry 60, *Apx 5a-6a.*
[59] With good reason, because the discovery that was undertaken while the parties awaited argument on the motion and then release of Judge Ransom's decision did not support plaintiff's theory that MFO could be held vicariously liable for Nyberg or Bakos.
[60] The original scheduling order set trial for December of 2003, which suggests that the bulk of the factual discovery would have been completed by the time the court ruled on MFO's motion in October.

NW2d 817 (1999) and in *Smith v Globe Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999), requiring a non-moving party to produce concrete, admissible evidence of a disputed fact, the Court of Appeals inexplicably wrote it thought "continuing discovery could provide a reasonable opportunity to find or uncover factual support for plaintiff's assertions."[61] The Estate, in essence, had asserted a vicarious liability claim without any factual basis, had failed to produce factual support for that claim after a year of discovery, but it was still allowed to pursue the claim.

The trial court was even less clear in its ruling. It failed to distinguish between plaintiff's theories of direct and vicarious liability. Instead, the court cited (a) remarks made by the President of and entirely separate entity, the Mott Foundation, at its 75th Anniversary celebration, explaining the Foundation's decision in 1969 to separate its charitable and family activities by forming the MFO Management Company,[62] and (b) a letter written by MFO rejecting the decedent's request for installation of a security alarm system.[63] Based on these two "facts," the trial court somehow concluded that there was evidence to support the claims asserted without ever addressing MFO's relationship with Nyberg and Bakos, the sole question raised by MFO's (C)(10) motion.[64]

b. Analysis

In Michigan, respondeat superior liability requires evidence of control by the purported principal. *Mantei v Michigan Public School Employees' Retirement System*, 256 Mich App 64, 78; 663 NW2d 486 (2003); *Ashker v Ford Motor Co*, 245 Mich App 9, 14-15; 627 NW2d 1

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[61] Court of Appeals Opinion, p 6, *Apx 135a*.
[62] Mott Foundation's 75th Anniversary literature, *Apx 57a-68a*.
[63] 1/27/86 letter from Yager to Eby, *Apx 56a*.
[64] Trial Court Opinion, p 8, *Apx 127a*.

(2001). Absent a right of control, there is no basis for vicarious liability. *Norris v State Farm Fire & Casualty*, 229 Mich App 231, 239; 581 NW2d 746 (1998). See also, *Rogers v J.B. Hunt Transport, Inc*, 466 Mich 645, 651-652; 649 NW2d 23 (2002) ("An employer is not vicariously liable for acts committed by its employees outside the scope of employment, because the employee is not acting for the employer or under the employer's control"). The Estate came forward with absolutely no evidence, only accusations, to support its claim of respondeat superior liability.

In 1999, this Court twice articulated the proper standard for evaluating summary disposition motions under MCR 2.116(C)(10). It specifically rejected the kind of "wait and see" approach applied here by the Court of Appeals. It is now well-settled that a non-moving party is obliged to "set forth specific facts showing that there is a genuine issue for trial" or else summary judgment will be granted. *Maiden, supra* at 119. "A litigant's mere pledge to establish an issue of fact at trial" is not enough. *Id.* A "mere promise is insufficient under our court rules." *Id* at 120. See also, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999) [a party faced with a (C)(10) motion must present "evidentiary proofs creating a genuine issue of material fact for trial" or summary disposition must be granted].

This standard is not somehow altered simply because discovery was still open when MFO's motion was filed. In the first place, all pleadings should be well grounded in fact before they are filed. MCR 2.114(D)(2). Additionally, our court rules specifically provide that motions for summary disposition under sub-rule (C)(10) may be brought at any time. MCR 2.116(B)(2). And Michigan courts have always recognized the utility of summary disposition prior to the close of discovery where "further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Village of Diamondale v Grable*, 240

Mich App 553, 567; 618 NW2d 23 (2000). In *Neumann v State Farm Mutual Auto Ins Co*, 180 Mich App 479, 485; 447 NW2d 786 (1989), defendant obtained summary disposition prior to the close of discovery under circumstances remarkably similar to those presented here, where a plaintiff had seven months to garner support to oppose a motion for summary disposition but instead relied on mere assertions of prematurity. The panel affirmed summary disposition, pointing out that plaintiffs with "no specific course of discovery in mind" who are on mere "hunting expedition(s) in the hope of finding factual support" does not cut the mustard.

These cases are consistent with a primary purpose of summary disposition procedure, which is "to avoid extensive discovery * * * when a case [or claim] can be quickly resolved with a ruling on an issue of law." *Mackey v Department of Corrections*, 205 Mich App 330, 333-334; 517 NW2d 303 (1994). Absent evidence that MFO controlled Nyberg or Bakos, plaintiff's claim of respondeat superior liability should have been rejected as a matter of law.

It is true that in some instances, a trial court could properly postpone its decision to allow discovery. Our court rules provide the framework for making that assessment. Where a non-moving party needs discovery to refute a motion for summary disposition, that party may file an affidavit stating that: "the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure." MCR 2.116(H). The affidavit must include (a) a statement naming the witnesses who will testify favorably and the reason such testimony is not available, and (b) a statement describing the probable testimony and the reason for believing that such testimony will be provided. Here, plaintiff's attorney filed an affidavit purporting to fit the requirements of MCR 2.116(H), but it really only described his discovery plan and then generally opined that "the witnesses' testimony

and evidence procured will lead to the conclusion that MFO is legally responsible for the actions of Todd Bakos and Victor Nyberg."[65] This affidavit was insufficient to satisfy MCR 2.116(H).

Even if the affidavit had been initially sufficient, plaintiff was required to do more. MFO produced the affidavits of the two persons alleged to be its agents or employees. Both testified they were not MFO's agent or employees. At some point prior to the trial court's ruling, the Estate was required to produce concrete, admissible evidence that MFO controlled Nyberg and Bakos. Because the Estate failed to do so, MFO was entitled to grant of summary disposition on the vicarious liability count.

The *Eby* panel affirmed denial of the vicarious liability aspect of MFO's motion by writing that "continuing discovery could provide a reasonable opportunity to find or uncover factual support for plaintiff's assertions." That completely discredited rationale has been creeping into more and more Court of Appeals cases of late, see e.g. the cases the panel relied on: *Peterson Novelties v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003) and *Stringwell v Ann Arbor Public Schools*, 262 Mich App 709, 714; 686 NW2d 825 (2004). This Court should reverse the Court of Appeals on this point and re-assert its primacy in terms of controlling summary disposition practice.

[65] Binkley Affidavit, ¶ 4, *Apx 71a.*

RELIEF REQUESTED

Defendant MFO Management Company asks this Court to reverse the opinion of the Court of Appeals and grant it summary disposition.

COLLINS, EINHORN, FARRELL & ULANOFF, P.C.

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ADDENDUM A

1 of 1 DOCUMENT

ANTHONY WILLIAMS and BRUCE WENDEL, Plaintiffs-Appellants, v V. R. THOMAS CONSTRUCTION COMPANY, Defendant-Appellant.

No. 263309

COURT OF APPEALS OF MICHIGAN

2006 Mich. App. LEXIS 572

March 2, 2006, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Oakland Circuit Court. LC No. 2003-054316-CZ.

DISPOSITION: Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

JUDGES: Before: Hoekstra, P.J., and Neff and Owens, JJ.

OPINION: PER CURIAM.

Plaintiffs appeal as of right from the trial court's order dismissing their claims for personal injury and property damage pursuant to *MCR 2.116(C)(7)* (claim barred by the statute of limitations), and dismissing their breach of contract claim pursuant to *MCR 2.116(C)(8)* (failure to state a claim). We reverse the dismissal of plaintiff Bruce Wendel's breach of contract claim and remand for further proceedings on that claim, but affirm in all other respects.

Defendant is a roofing company that contracted with the Oakland Livingston Human Services Agency (OLHSA) to provide roofing services for indigent homeowners through the agency's "Project Warmth" program. In late 1999, plaintiff Anthony Williams applied to OLHSA for [*2] assistance in replacing the roof on a home owned by plaintiff Wendel. Although Williams was living in the home with Wendel at the time, he held no legal ownership or property interest in the home. Williams falsely represented on the application form that he was the homeowner and sole occupant of the home. OLHSA contracted with defendant to replace the roof, and defendant completed the work in January 2000.

Almost immediately plaintiffs began complaining to OLHSA and the local building inspector that defendant's work, which was ultimately replaced, was substandard and defective. In November 2003, plaintiffs filed this action for negligence, breach of contract, intentional infliction of emotional distress, and "conduct of trade." Plaintiffs alleged that defendant failed to properly repair the roof, which caused toxic black mold to grow inside the home, which in turn led to various sinus and upper respiratory illnesses. Defendant filed two motions for summary disposition. In its first motion, defendant argued that plaintiffs' personal injury claims were barred by the statute of limitations, and that plaintiff Williams' breach of contract claim should be dismissed because he was neither [*3] a party to defendant's contract with OLHSA nor a third-party beneficiary of that contract. In its second motion, defendant alleged that there was no genuine issue of material fact with respect to the causation element of plaintiffs' claims.

The trial court determined that plaintiffs' claims for personal injury and property damage were governed by a three-year limitations period, *MCL 600.5805(10)*, but were subject to a "discovery rule" which, according to the court, "tolls the Statute of Limitations for 6 months after the date that Plaintiffs knew or should have known of the possible cause of action." The court found that plaintiffs' claims were untimely under either rule, explaining that "plaintiffs filed the instant lawsuit . . . more than 3 years and 6 months after the claims accrued or were discovered." The court also dismissed plaintiffs' breach of contract claim on the ground "that Plaintiffs have failed to state a claim of third party beneficiary." Accordingly, the trial court granted defendant summary disposition under *MCR 2.116(C)(7)* and (8).

I

Plaintiffs first argue that the trial court erred in determining that their claims [*4] for personal injury and

property damage were barred by the statute of limitations. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Novak v Nationwide Mut Ins Co, 235 Mich. App. 675, 681; 599 N.W.2d 546 (1999).* Summary disposition may be granted under *MCR 2.116(C)(7)* when a claim is barred by the statute of limitations. *Id.* at 681. When reviewing a motion under this subrule, the court should consider all documentary evidence submitted by the parties, and construe all undisputed allegations in favor of the plaintiff to determine whether the claim is time-barred. *Id.* at 681-682.

Plaintiffs' claims for personal injury and property damage are governed by the three-year period of limitations prescribed in *MCL 600.5805(10).* The period of limitations runs from the time a claim accrues. *MCL 600.5827.* A claim accrues "at the time the wrong upon which the claim is based was done regardless of when damage results." *Id.* In this case, defendant initially completed its roofing work in January 2000. Plaintiffs did not commence **[*5]** this action until more than three years later in November 2003.

Our Supreme Court has recognized that a discovery rule may be applied in some cases to avoid unjust results that could occur when a reasonable and diligent plaintiff cannot bring the claim within the applicable limitations period either because of the latent nature of the injury or the inability of the plaintiff to learn of or identify the causal connection between the injury and the defendant's breach of duty. *Moll v Abbott Laboratories, 444 Mich. 1, 15-16; 506 N.W.2d 816 (1993);* see also *Trentadue v Buckler Automatic Lawn Sprinkler Co, 266 Mich. App. 297, 301; 701 N.W.2d 756 (2005).* Where the discovery rule is found to be appropriate, the plaintiff's claim accrues when the plaintiff discovers, or, through the exercise of reasonable diligence should discover, the injury and the causal connection between the injury and the defendant's breach of duty. *Id.* at 301-302.

Here, plaintiffs were clearly aware of the defects in defendant's roofing work on or before October 23, 2000, which is the date James Broginski, OLHSA's roofing inspector, acknowledged Williams' **[*6]** concerns about defendant's work. Accordingly, to the extent that plaintiffs' complaint seeks damages for injury to their property, the statute of limitations expired on or before October 23, 2003, three weeks before this action was filed.

However, plaintiffs' complaint also seeks damages for personal injury resulting from the mold growth. Plaintiffs asserted below that defendant's defective roofing work caused the growth of toxic mold, but that they did not discover until October 15, 2001, the date mold samples were collected from plaintiffs' home, that the mold growth was causally related to their illnesses. Although defendant asserts that plaintiffs knew that its work was defective shortly after the work was completed, defendant has not identified any evidence showing that plaintiffs knew or should have known about the causal connection between the mold and plaintiffs' illnesses before October 15, 2001.

The trial court relied on October 15, 2001, as the date that plaintiffs discovered the causal connection between the mold growth and their illnesses, but then stated that "the discovery rule tolls the Statute of Limitations for 6 months after the date that Plaintiffs knew or should **[*7]** have known of the possible cause of action." The basis for the trial court's reference to a six-month tolling period is not clear. n1 If the discovery rule applies, the three-year limitations period did not begin to run until plaintiffs learned, or with reasonable diligence should have learned, that their illnesses were caused by the mold growth that resulted from defendant's allegedly defective work.

> n1 Although *MCL 600.5838(2)* and MCL 5838a(2) both refer to six-month discovery periods, those statutes apply to actions involving claims for malpractice and are not applicable here.

But the discovery rule is not applicable to all claims. The discovery rule is generally applied where there is some verifiable basis for the plaintiff's inability to bring the claim within the statutory period. *Nelson v Ho, 222 Mich. App. 74, 86; 564 N.W.2d 482 (1997).* Here, plaintiffs do not explain why they were unable to recognize a possible connection between the mold in the **[*8]** house and their upper respiratory illnesses. They have not demonstrated a verifiable basis for their inability to bring their claim within the three-year period. In *Lemmerman v Fealk, 449 Mich 56, 66-67; 534 N.W.2d 695 (1995),* our Supreme Court summarized the situations in which application of the discovery rule has been deemed necessary to avoid unjust results:

We have found such situations present, e.g., where there has been a negligence action brought against a hospital and its agent before statutory characterization of such negligence as medical malpractice, . . . in pharmaceutical products liability actions, . . . and in asbestos-related products liability actions . . . . In each of those cases, we have weighed the benefit of application of the discovery rule to the plaintiff against the harm this exception would visit on the defendant and the important policies underpinning the applicable statute of limitations. Balancing is facilitated where there is objective evidence of injury and causal connection guarding against the danger of stale claims and a verifiable basis

for the plaintiffs' inability to bring their claims within the statutorily **[*9]** proscribed limitation period. [Citations omitted.]

In *Lemmerman, supra at 67-68,* the Court, referring to its decision in *Larson v Johns-Manville Sales Corp, 427 Mich. 301; 399 N.W.2d 1 (1986),* stated that the discovery rule is appropriately applied to asbestos cases "because the latent nature of asbestos injuries made it difficult for plaintiffs to diligently pursue their claims, while the longer period in which defendants were vulnerable to suit did not make it appreciably more difficult for them to defend."

Here, plaintiffs have not demonstrated that their injuries were latent in nature, nor do they specify when they first experienced symptoms. Additionally, extension of the limitations period will hamper defendant's ability to defend the action. Because of the delay, it will be more difficult for defendant to correlate plaintiffs' illnesses with the growth of the mold, and it will also be more difficult to determine whether other factors may have contributed to the mold growth or plaintiffs' illnesses. We therefore conclude that this case does not present a situation where the discovery rule should be applied.

In sum, it **[*10]** is not apparent that this is an appropriate case for application of the discovery rule, and plaintiffs themselves make no effort to justify application of the discovery rule to the circumstances of this case. However, although the trial court erred in its reliance on a six-month discovery rule, this Court will not reverse a trial court's order if it reached the right result for the wrong reason. *Etefia v Credit Technologies, Inc, 245 Mich. App. 466, 470; 628 N.W.2d 577 (2001).* Because plaintiffs' claims for personal injury and property damage were not filed within three years after defendant completed its roofing work, and because plaintiffs have failed to demonstrate that this is an appropriate case for application of the discovery rule, we affirm the trial court's dismissal of these claims based on the statute of limitations.

II

The trial court dismissed plaintiffs' breach of contract claim under *MCR 2.116(C)(8)*, stating that plaintiffs "failed to state a claim of third party beneficiary." We disagree.

A motion under *MCR 2.116(C)(8)* tests the legal sufficiency of the complaint. *Adair v State of Michigan, 470 Mich. 105, 119;* **[*11]** *680 N.W.2d 386 (2004).* Are viewing court must accept all well-pleaded factual allegations as true and construe them in a light most favorable to the non-moving party. *Id.* The motion may be granted only where the claim alleged is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

To plead a breach of contract claim as a third-party beneficiary, a plaintiff must allege:

(1) that a valid contract existed; (2) that a contractual term was violated by the defendant; (3) that the plaintiff was a third-party beneficiary of the contract; and (4) that the defendant's nonperformance resulted in damage to the plaintiff. 2 Callaghan's Michigan Pleading & Practice, § 22:35, pp 112-113. Plaintiffs alleged that defendant "entered into a binding written agreement to perform services, and supply materials," and that defendant" breached the contract by rendering performance that failed to conform to the contractual requirements." Plaintiffs also alleged that they were "intended third-party beneficiaries pursuant to a contract with the Oakland Livingston Human Services Agency for remedial services to be performed on the **[*12]** Plaintiffs' residence by the Defendant," and that they were "entitled to full performance as intended third-party beneficiaries." Plaintiffs alleged generally that they "sustained injuries and damages as a result of the Defendants' [sic] omissions/commissions," including medical problems and property damage.

In *Iron Co v Sundberg, Carolson & Assoc, Inc, 222 Mich. App. 120, 124; 564 N.W.2d 78 (1997),* this Court stated:

Under Michigan's rule of general fact-based pleading, see *MCR 2.111(B)(1)*, the only facts and circumstances that must be pleaded "with particularity" are claims of "fraud or mistake." *MCR 2.112(B)(1).* In other situations, *MCR 2.111(B)(1)* provides that the allegations in a complaint must state "the facts, without repetition, on which the pleader relies," and "the specific allegations necessary reasonably to inform the adverse party" of the pleader's claims. See *Dacon v Transue, 441 Mich. 315, 330; 490 N.W.2d 369 (1992).* A complaint is sufficient under *MCR 2.111(B)(1)* as long as it "contain[s] allegations that are specific **[*13]** enough reasonably to inform the defendant of the nature of the claim against which he must defend."

Plaintiffs' allegations were sufficient to plead a claim for breach of contract as third-party beneficiaries. Plaintiffs alleged that they were intended third-party beneficiaries of defendant's contract with OLHSA, and that defendant breached that contract by performing substandard work. Although plaintiffs did not explicitly state that defendant's breach caused their illnesses and property damage, their general allegations of injury were sufficiently specific to reasonably inform defendant of this claim. Because plaintiffs' complaint adequately stated a third-party beneficiary claim, the trial court erred in granting summary disposition under *MCR 2.116(C)(8).*

Defendant argues, however, that "the facts established in discovery make it clear that both [plaintiffs] were no more than incidental beneficiaries of the Thomas-OLHSA contract and therefore could not have sued Thomas under the statute." In substance, defendant argues that summary disposition should have been granted under *MCR 2.116(C)(10)* (no genuine issue of material fact). Although **[*14]** the trial court did not grant summary disposition under this subrule, an order granting summary disposition under the wrong rule may be reviewed under the correct subrule. *Stoudemire v Stoudemire, 248 Mich. App. 325, 332 n 2; 639 N.W.2d 274 (2001).*

Amotion under *MCR 2.116(C)(10)* tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC, 261 Mich. App. 534, 539; 683 N.W.2d 200 (2004).* The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Id.* at 540; see also *MCR 2.116(C)(10)* and (G)(4).

Defendant argues that plaintiffs cannot be third-party beneficiaries of its contract with OLHSA because plaintiff Williams did not own the house and plaintiff Wendel did not apply for OHLSA's assistance. *MCL 600.1405* provides, in **[*15]** pertinent part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.
>
> (2)(a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.
>
> (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged **[*16]** by agreement between the promisor and the promisee in the meantime.

An objective standard is used to determine whether a plaintiff is a third-party beneficiary of a contract. *Krass v Tri-County Security, Inc, 233 Mich. App. 661, 665-666; 593 N.W.2d 578 (1999).* The contract itself reveals the parties' intentions. *Id. at 666.*

In *Koenig v South Haven, 460 Mich. 667; 597 N.W.2d 99 (1999),* our Supreme Court explained that § 1405 allows the contracting parties to designate a class of persons as the intended beneficiaries of a contract, and that unnamed and unascertained persons qualify as third-party beneficiaries if they belong to that class. The Court stated:

> Simply stated, section 1405 does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation "directly" to or for the person. This language indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred **[*17]** to in the contract, before the third party is able to enforce the contract. Subsection 1405(2)(b)'s recognition that a contract may create a class of third-party beneficiaries that includes a person not yet in being or ascertainable precludes an overly restrictive construction of subsection 1405(1). That is, it precludes a construction that would require precision that is impossible in some circumstances, such as would be the case if there were a requirement in all cases that a third-party beneficiary be referenced by proper name in the contract. [*Id.* at 676-677.]

The Court explained that a third-party beneficiary may be one of a class of persons, if the class is sufficiently described or designated. *Id.* at 680. The Court also explained that "only *intended* third-party beneficiaries, not *incidental* beneficiaries, may enforce a contract under § 1405." *Id.*

An examination of the contract between defendant and OLHSA reveals that its obvious purpose is to benefit homeowners who could not afford weatherproofing services. It is also apparent from the contract that defendant understood that it was performing work for the direct benefit of the homeowner, even if it **[*18]** did not know the owner's identity. Defendant's contract with OLHSA required it to "complete roofing on assigned homes during the term of this Contract," and stated that "failure to complete the assigned homes shall result in unsatisfactory performance under this Contract." The contract obligated OLHSA to inspect each home after the work was completed, and required defendant to provide both "the client and OLHSA" with a written guarantee. These pro-

visions express OLHSA's intent to retain defendant's services in order to benefit the client, i.e., the homeowner. The contract further states that "no work shall begin until the Agency issues a written Job Order to the Contractor." The "Proceed to Work Order" in this case listed defendant as the contractor and plaintiff Williams as the client. This document also indicates that the project was funded by a low-income home energy assistance program and the Oakland County Community Development Block Grant. Because the contract clearly indicates that OLHSA was paying defendant to perform work on the homes of OLHSA's clients, and obligated defendant to guarantee its work for the benefit of the clients, we conclude that homeowners receiving OLHSA's **[*19]** assistance constitute a clearly designated class of persons intended as beneficiaries of the contract between defendant and OLHSA. Although plaintiff Wendel, the homeowner, is not identified as an owner in the contract or job order, he clearly is a member of this designated class. Therefore, plaintiff Wendel qualifies as an unascertained third-party beneficiary under § 1405(2)(b).

Defendant's reliance on *Koenig, supra,* to argue that plaintiff Wendel is only an incidental beneficiary, is misplaced. In *Koenig*, the plaintiffs' decedent was swept off a pier on a windy day. *Id. at 670.* The defendant city and the Army Corps of Engineers were parties to a contract that required the defendant to deny the public access to the pier during periods of inclement weather. *Id. at 670-671.* The plaintiffs argued that the decedent was a third-party beneficiary of that contract, and that they were entitled to sue for breach under§ 1405. *Id. at 672.* The Supreme Court held that the contract "only references the public generally and includes no provision by which [the defendant] undertook to do anything directly for a *designated* **[*20]** class of persons that included [the decedent]." *Id. at 682-683.* The Court concluded that "the public" was "too broad a term to constitute a class that a contracting party could undertake *directly* to benefit under subsection 1405(1)." *Id. at 683.* This case is distinguishable, because here OLHSA did not contract with defendant to perform services for the general public, but for OLHSA's clients, i.e., individual homeowners who qualified for assistance.

This case is more analogous to *Hammack v Lutheran Social Services of Michigan, 211 Mich App 1; 535 N.W.2d 215 (1995).* In *Hammack*, the defendant was a social services agency that contracted with the state to operate a semi-independent living facility for developmentally disabled individuals. *Id.* at 3. The plaintiff's decedent suffered a seizure and drowned while bathing unsupervised. *Id.* This Court held that the decedent was a third-party beneficiary of the contract because the defendant promised to provide appropriate services for the facility's residents. *Id.* at 7. Here, defendant's relationship to OLHSA and the recipients of its services is similar **[*21]** to the living facility's relationship to the state and the beneficiaries of the state services. Accordingly, we conclude that the trial court erred in dismissing plaintiff Wendel's breach of contract claim.

We agree, however, that there is no genuine issue of material fact that plaintiff Williams was not an intended beneficiary of the contract between defendant and OLHSA, but is rather only an incidental beneficiary. Williams had no property interest in the house, and he had no familial or legal relationship with Wendel. Thus, he derived benefits from the contract only because Wendel permitted him to live there. Moreover, when Williams filled out the application, he falsely represented that he was the owner and sole occupant of the house. Consequently, defendant could not have known that it was performing work for anyone other than the (actual) owner. We therefore conclude that defendant was entitled to summary disposition with respect to plaintiff Williams's breach of contract claim under *MCR 2.116(C)(10).*

III

Plaintiffs raise several other issues that require only brief discussion. Although plaintiffs argue that the trial court improperly denied them transcripts **[*22]** at no cost, the trial court's opinion and order indicates that the court decided defendant's motion without oral argument, and plaintiffs fail to specify what transcripts they requested but did not receive. Plaintiffs also complain that their attorney was ineffective and unethical. However, these claims do not challenge any action or decision by the trial court, and this appeal is not the appropriate forum for these complaints. Although the Sixth Amendment affords an indigent criminal defendant the right to the effective assistance of counsel in criminal prosecutions, it has no applicability to civil proceedings. See *United States v $ 100,375.00 in United States Currency*, 70F3d 438, 440 (CA 6, 1995), and *Haller v Haller, 168 Mich App 198, 199-200; 423 N.W.2d 617 (1988).* Plaintiffs also assert that defendant's attorney acted unethically by submitting false affidavits from defendant's president. Plaintiff did not challenge the affidavits in the trial court, however, and plaintiffs have not demonstrated on appeal that the affidavits contain any demonstrably false statements. Accordingly, we find no merit to this issue.

In sum, we reverse the trial court's **[*23]** dismissal of plaintiff Wendel's breach of contract claim, but affirm the dismissal of all claims by plaintiff Williams, and all remaining claims by plaintiff Wendel.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

/s/ Janet T. Neff

ADDENDUM B

1 of 1 DOCUMENT

In the Matter of the JERVIS C. WEBB Trust. CHRISTOPHER J. WEBB, Petitioner-Appellant, v JERVIS H. WEBB, Trustee, and JOYCE W. CLARK, Former Trustee, Respondents-Appellees. In the Matter of the JERVIS B. & MAUREEN C. WEBB Trust. CHRISTOPHER J. WEBB, Petitioner-Appellant, v SUSAN M. WEBB, Trustee, BARBARA J. WEBB, Trustee, and JOYCE W. CLARK, Former Trustee, Respondents-Appellees. CHRISTOPHER J. WEBB, Petitioner-Appellant, v BARBARA M. WEBB, Personal Representative of the Estate of GEORGE H. WEBB, Deceased, Respondent-Appellee.

No. 263759, No. 263900, No. 263901

COURT OF APPEALS OF MICHIGAN

2006 Mich. App. LEXIS 209

January 24, 2006, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Oakland Probate Court. LC No. 2003-289748-TV, LC No. 2004-291906-TV, LC No. 2004-291905-CZ.

DISPOSITION: Affirmed.

JUDGES: Before: Sawyer, P.J., and Wilder and H. Hood * , JJ.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

OPINION: PER CURIAM.

In these consolidated cases, petitioner alleges that the trustees of his father's and grandparents' trusts breached their fiduciary duties by retaining stock held in the family's closely owned corporation, the Jervis B. Webb Company, and by failing to diversify the assets of the trusts and invest in stocks that paid higher dividends. The parties filed cross-motions for summary disposition and the probate court granted partial summary disposition for respondents. The court granted partial summary disposition under *MCR 2.116(C)(7)*, based on the statute of limitations. Additionally, the court granted summary disposition under *MCR 2.116(C)(10)*, holding that there was no genuine issue of material fact [*2] that respondents did not breach their fiduciary duties by retaining the family stock and failing to diversify the trusts' assets. Petitioner appeals as of right. We affirm. n1

n1 We find no merit to respondents' argument that this Court does not have subject-matter jurisdiction over respondents Jervis H. Webb, Susan Webb, and Barbara Webb, because they were not named as respondents in the trial court. As current or former trustees of the trusts at issue, they are each interested persons, *MCL 700.1105*, and, therefore, are properly respondents in these appeals in their representative capacities. We decline to consider petitioner's Exhibits 2-5, and 8-9, attached to his brief on appeal because those documents were not presented in the trial court. *Isagholian v Transamerica Ins Corp, 208 Mich. App. 9, 18; 527 N.W.2d 13 (1994).*

This case involves two different trusts and three separate actions that arise out of the two trusts. The two trusts primarily consist [*3] of stock in the Jervis B. Webb Company ("the Company"), which was founded by Jervis B. Webb in 1919. The Company has grown significantly over the years, but remains a closely owned corporation and its leadership has passed between generations of the Webb family. Almost all of the Company's stock is held by family members or their trusts.

Jervis B. Webb and his wife, Maurene, n2 founded the Company. Their children, Jervis C. Webb, George Webb, and Joyce Clark, comprise the second generation. Petitioner is the son of Jervis C. Webb. Petitioner and his

six siblings, along with six children of George and Joyce, comprise the third generation.

> n2 According to respondents, "Maurene" is the correct spelling of petitioner's grandmother's name, but her name is incorrectly spelled as "Maureen" on the trust agreement.

There has been a long history of family members working for the Company. Petitioner worked for the Company after graduating from law school and served as a vice president and general counsel for the Company **[*4]** until November 2002.

In 1946, Jervis B. and Maurene Webb established a trust naming their three children, Jervis C., George, and Joyce, as co-trustees. That trust (hereinafter referred to as the "1946 trust") was funded solely with the Company's stock.

In 1989, Jervis C. Webb, petitioner's father, created a trust for the benefit of his children who had jobs with the Company (hereinafter referred to as the "1989 trust"). Jervis C. Webb named his siblings, George and Joyce, as the trustees.

At issue in this case are petitioner's claims that the trustees of both trusts breached their fiduciary duties. The probate court concluded that petitioner's claims were barred by the three-year limitations period prescribed in *MCL 600.5805(10)* and, therefore, granted summary disposition under *MCR 2.116(C)(7)*. The court additionally held that there was no genuine issue of material fact that the trustees did not breach their fiduciary duties by retaining the Company stock and failing to diversify the trusts' assets and, therefore, granted summary disposition under *MCR 2.116(C)(10)*.

This Court reviews a trial court's decision **[*5]** on summary disposition de novo. *Spiek v Dep't of Transportation, 456 Mich. 331, 337; 572 N.W.2d 201 (1998)*. Summary disposition may be granted under *MCR 2.116(C)(7)* when a claim is barred by the statute of limitations. As explained in *Turner v Mercy Hospitals & Health Services of Detroit, 210 Mich. App. 345, 348; 533 N.W.2d 365 (1995)*,

> [a] defendant who files a motion for summary disposition under *MCR 2.116(C)(7)* may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. *MCR 2.116(G)(3)*; *Patterson v Kleiman, 447 Mich. 429, 432; 526 N.W.2d 879 (1994)*. If such documentation is submitted, the court must consider it. *MCR 2.116(G)(5)*. If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff.

"If the pleadings or other documentary evidence reveal no genuine issues of material fact, the **[*6]** court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr, 242 Mich. App. 703, 706; 620 N.W.2d 319 (2000)*.

A motion under *MCR 2.116(C)(10)* tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson, 212 Mich. App. 45, 48; 536 N.W.2d 834 (1995)*.

The trial court held that petitioner's claims were governed by the three-year period of limitations prescribed in *MCL 600.5805(10)*. *MCL 600.5827* addresses when a claim accrues for purposes of determining when the statute of limitations begins to run:

> Except as otherwise provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838 [*MCL 600.5829* to *MCL 600.5838*], and in cases not covered by these sections the claim accrues at the time **[*7]** the wrong upon which the claim is based was done regardless of the time when damage results.

Sections 5829 to 5838 do not apply to this case. Therefore, pursuant to *MCL 600.5827*, petitioner's claim accrued at the time the alleged wrong was committed, regardless of when damages resulted, unless the discovery rule applies. The parties disagree whether the discovery rule can be applied to extend the period of limitations to claims involving breaches of fiduciary duty. We agree with the trial court that the discovery rule does not apply to this case.

In *Boyle v General Motors Corp, 468 Mich. 226, 228-229, 231-232; 661 N.W.2d 557 (2003)*, the Supreme Court reversed this Court's determination that the discov-

ery rule applies to fraud claims. The Supreme Court's decision was based on *MCL 600.5827*, as well as its prior decisions in *Thatcher v Detroit Trust Co, 288 Mich. 410; 285 NW 2 (1939),* and *Ramsey v Child, Hulswit & Co, 198 Mich. 658; 165 NW 936 (1917),* where the Court refused to apply the discovery rule in fraud cases. n3 In *Boyle, supra at 231-232,* **[*8]** the Court stated:

> The discovery rule has been adopted for certain cases. For example, in *Johnson v Caldwell, [371 Mich. 368; 123 N.W.2d 785 (1963),]* the Court held that the discovery rule applies to actions for medical malpractice. This Court has not, however, overruled *Ramsey* and *Thatcher*, or held that the discovery rule applies to actions for fraud or intentional misrepresentation. Moreover, after *Ramsey* and *Thatcher* were decided the Legislature enacted *MCL 600.5827*, which provides:
>
> "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."
>
> Under MCL 600.5827a claim accrues when the wrong is done, unless § § 5829 to 5838 apply. Plaintiff does not claim that any of those sections apply.
>
> The Court of Appeals erred in holding that the discovery rule applies to the accrual of actions for fraud. That holding directly contradicts **[*9]** *Ramsey* and *Thatcher* and ignores the plain language of *MCL 600.5813* and *600.5827.*
>
> Plaintiffs' cause of action accrued when the wrong was done, and they had six years thereafter to file a complaint. Because plaintiffs failed to do so, their cause of action is barred. [Footnotes omitted.]

n3 *Thatcher* also involved a claim for breach of fiduciary duty by a trustee which was barred by the statute of limitations.

Although *Boyle* involved a fraud claim, the principle applies here as well: the language of *MCL 600.5827* is clear and unambiguous that a claim accrues when the wrong is committed, not when it is discovered, unless it falls within § § 5829 to 5838. Thus, because the claim here does not fall within § § 5829 to 5838, the proper test for determining when petitioner's claim for breach of fiduciary duty accrued is not when he knew or should have known of the alleged breach, but when the alleged wrong was committed, **[*10]** causing the alleged harm. *Boyle, supra at 231 n 5.* n4

n4 To the extent that this Court has held that a claim for breach of fiduciary duty accrues when the beneficiary knew or should have known of the breach, see *Bay Mills Indian Community v Michigan, 244 Mich. App. 739, 751; 626 N.W.2d 169 (2001),* we believe those cases have been overruled by *Boyle.* However, an exception to this rule exists for claims of fraudulent concealment. See *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute, 266 Mich. App. 39, 45-48; 698 N.W.2d 900 (2005); MCL 600.5855.* Petitioner has not argued that *MCL 600.5855* applies in this matter.

On the basis of the undisputed documentary evidence presented below, it is apparent that petitioner was clearly aware of both trusts and their holdings of the Company's stock for many years before these actions were filed. Because any **[*11]** alleged harm arising from respondents' alleged breaches of their fiduciary duties occurred more than three years before these actions were filed, the trial court properly granted summary disposition under *MCR 2.116(C)(7).*

We find no merit to petitioner's argument that his claims are not subject to the statute of limitations. Our Supreme Court has clarified that statutes of limitation apply to claims for breach of fiduciary duty that are cognizable at law. See *Thatcher, supra at 416-417.* Thus, *MCL 600.5805* was properly applied to petitioner's claims.

In addition, petitioner's reliance on *MCL 700.7307(4)* for the proposition that he had five years to file his claims is misplaced. Subsection (4) of that statute was not added until the statute was amended, effective September 1, 2004. Statutes of limitation generally are

not given retroactive effect unless such an intent clearly and unequivocally appears from the context of the statute itself. *Gorte v Dep't of Transportation, 202 Mich App 161, 167; 507 N.W.2d 797 (1993).* No such intent appears here and, therefore, **[*12]** *MCL 700.7307(4)* may not be applied retroactively.

Petitioner next argues that the trial court erred in holding that there was no genuine issue of material fact with respect to petitioner's claims that the trustees breached their fiduciary duties by retaining the Company stock and not diversifying the trusts' assets.

We must refer to the trust instruments to determine the powers and duties of the trustees and the intent of the settlors regarding the purpose of the trusts. *In re Butterfield Estate, 418 Mich 241, 259; 341 N.W.2d 453 (1983).* In addition, relevant statutes and case law define a trustee's duties. *In re Green Charitable Trust, 172 Mich. App. 298, 312; 431 N.W.2d 492 (1988).* Whether there has been a breach of duty and any resulting liability is dependent upon the facts of each case. *Id.*

Generally, trustees must meet the standard of care of a prudent person when dealing with trust property. *In re Green Charitable Trust, supra at 312.* This rule is codified at *MCL 700.7302* (formerly MCL 700.813) n5:

> Except as otherwise provided by the **[*13]** terms of the trust, the trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills.

To be prudent means to act with care, diligence, integrity, fidelity, and sound business judgment. *In re Messer Trust, 457 Mich. 371, 380; 579 N.W.2d 73 (1998).* In addition, a trustee is bound by the fiduciary duties of honesty, loyalty, good faith, and restraint from self-interest. *In re Green Charitable Trust, supra at 313.*

> n5 MCL 700.813, repealed by *1998 PA 386,* provided as follows:
>
> > Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

[*14]

The prudent investor rule may require a trustee to diversify a trust's investments. That rule is summarized in Restatement Trusts, 3d (Prudent Investor Rule) (1990), § 227(b), p 8, as follows:

> In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

While there may generally be a duty to diversify investments, a settlor may always authorize a trustee not to diversify. *Baldus v Bank of California, 12 Wn. App. 621, 628; 530 P.2d 1350, 1355 (1975).*

> Liability for lack of diversification is based upon a breach of a fiduciary's duty to prudently manage the estate. *In re Estate of Janes, 165 Misc 2d 743; 630 NYS2d 472 (1995).* To determine whether such a breach of duty occurred, the Court must evaluate the fiduciary's actions along with relevant factors which affected or ought to have affected the fiduciary's decisions; for instance, the performance of the market, the corpus of the estate (both in size and composition), the situation and needs of the beneficiaries, potential tax consequences, **[*15]** the time (investment) horizon of the estate, the terms of the governing instrument . . . and the intent of the settlor . . . .
>
> In this extensive and non exhaustive list, the terms of the governing instrument are highly important because the terms of the instrument itself can set the stage for the weight to be applied to the other factors, and can completely reframe the fiduciary's perspective in monitoring the interplay between them. [*In the Matter of Will of Charles G Dumont, 4 Misc 3d*

1003(A); *791 N.Y.S.2d 868* (NY Sur, 2004).]

An examination of the trust provisions in these cases reveal that the settlors of both trusts relieved the trustees of any duties to diversify assets and follow the prudent man investor rule with respect to the Company's stock.

The 1946 trust specifically gave the trustees the authority to retain the Company stock even if it might be imprudent to do so:

> 6. The Trustees shall invest and reinvest the trust estate in such investments as they deem proper. *They shall not be required to dispose of stock in the Jervis B. Webb Company, or any company succeeding to part or all of the business of Jervis B. Webb Company, and* **[*16]** *they may retain the same or may make loans to or additional investments in any such company regardless of whether they consider it a prudent investment for trustees.* Stock dividends and stock rights are to be treated as corpus. Any action of the Trustees, including voting stock or deciding on investments or sales, shall be valid if taken by a majority. . . . [Emphasis added.]

The 1989 trust similarly allowed the trustees to retain the Company stock, and further expressed the settlor's intent that the purpose of the trust was to retain the Company's stock so that his children, who were employed by the Company, would thereby benefit.

> Five of Settlor's seven children and the spouse of a sixth are employed by the Jervis B. Webb Company. Settlor believes it would enhance the interest of these six children and their spouses in the Webb Companies as that term is defined below and would strengthen the companies if the six children were to acquire a beneficial interest in them on the terms set forth below. Settlor owns stock in the companies and wants to use it to set up such a beneficial interest. Accordingly, Settlor by these presents assigns, transfers, conveys and delivers to **[*17]** the Trustees the property described in the schedule attached hereto and made a par thereof. The Trustees agree to hold the same on the following terms and conditions.
>
> * * *
>
> (b) Powers of Trustee.
>
> (i) *The Trustees specifically are authorized to retain all shares of stock in any Webb companies without regard to any rule or requirement of diversification of investments, and even if such stock does not pay dividends or pays only a small dividend.* For purposes of this trust, the term "Webb companies" shall include Jervis B. Webb Company and any corporation now or hereafter affiliated with or growing out of Jervis B. Webb Company, and "stock of Webb companies" shall include stock received as a result of a change in capital structure, liquidation, partial liquidation, reorganization, split-up, spin-off, dissolution or merger involving Jervis B. Webb Company or any other Webb Company.
>
> (ii) Subject to (i), above, the Trustees shall have the power to invest and reinvest the trust assets in such stocks, bonds and other securities and properties as they may deem advisable, including unsecured obligations, undivided interests, interests in investment funds, mutual funds, legal and **[*18]** discretionary common trust funds, leases, properties which are outside of the State of Michigan and partnerships, all without diversification as to kind or amount and without being restricted in any way by any statute or court decision (now or hereafter existing) regulating or limiting investments by fiduciaries; and to register and carry any property in their own names or in the names of their nominee or to hold it unregistered.
>
> (iii) In addition to the powers granted above and elsewhere in this Agreement and to all powers granted by law to trustees generally, the Trustees shall have the powers and authority set forth in Article 8 of the Revised Probate Code, being Public Act 642 of Michigan, 1978, which Article is incorporated herein by reference, as it exists on the date of this Agreement. [Emphasis added.]

Although both trusts vested the trustees with the discretion to sell the Company's stock, they also vested the trustees with the authority to retain the stock even if it would not be prudent to do so, without regard to the rules of diversification, and even if the stock did not pay dividends. The 1989 trust also made it clear that the settlor intended that the trustees **[*19]** should retain the Com-

pany stock so that the family could maintain control of the Company and continue to have employment opportunities with the Company.

The trial court properly determined that both trusts relieved the trustees of any duty of diversification. Because both trusts allow the trustees to retain the stock even if it would not be prudent to do so, there is no genuine issue of material fact that the settlors of both trusts intended that the trustees would not be subject to the prudent investor rule with respect to the Company stock. Accordingly, petitioner cannot rely on that rule to argue that respondents breached their fiduciary duties as trustees by holding onto the stock.

Respondents acknowledge that a court of equity may intervene and change the terms of a trust if some unusual exigency arises that was not contemplated by the settlor. *Young v Young, 255 Mich. 173, 179-180; 237 NW 535 (1931).* Here, however, petitioner has not demonstrated that such an exigency existed.

In light of the plain language of the trust instruments that clearly demonstrate that the trustees may retain the Company stock even if it would not be prudent to do **[*20]** so, the trial court did not err in concluding that petitioner failed to establish a genuine issue of material fact with regard to his claims that the trustees breached their fiduciary duties by retaining the Company stock and failing to diversify the trusts' assets.

Affirmed.

/s/ David H. Sawyer

/s/ Kurtis T. Wilder

/s/ Harold Hood

ADDENDUM C

LEXSEE 2005 US DIST LEXIS 24643

JOSEPH RAIMONDO, Plaintiff, v. THOMAS F. MYERS; GARAN, LUCOW, MILLER, P.C.; ARMADA VILLAGE, INC.; NANCY PARMENTER; JOSEPH GOLEMBIEWSKI; ROBERT STANDFEST; MEADOWBROOK CLAIMS SERVICE; MACOMB COUNTY; MACOMB COUNTY CORPORATE COUNSEL; JAMES S. MEYERLAND; RALPH GOODE; G. GUS MORRIS; COX, HODGAM AND GLAMARCO, P.C.; TOWNSHIP OF CLINTON; GREGORY T. STREMERS; TOUMA, WATSON, WHALING, COURY AND CASTELLO, P.C.; CAPAC STATE BANK, INC.; CAPAC BANCORP, INC.; JOSEPH F. SALAS; MARK L. CLARK; MCLEAN, MIJAK, AND CLARK, P.C.; JAMES R. CASE; KERR, RUSSELL AND WEBER, P.L.C.; and JOHN DOE, Defendants.

Case No. 04-CV-74287-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2005 U.S. Dist. LEXIS 24643

October 25, 2005, Decided
October 25, 2005, Filed

SUBSEQUENT HISTORY: Complaint dismissed at *Raimondo v. Myers, 2006 U.S. Dist. LEXIS 46971 (E.D. Mich., June 30, 2006)*

COUNSEL: **[*1]** Joseph Raimondo, Plaintiff, Pro se, Armada, MI.

For Thomas F. Myers, Defendant: Mark E. Shreve, Garan Lucow, Troy, MI; Thomas F. Myers, Garan Lucow (Detroit), Detroit, MI.

For Garan, Lucow, Miller, P.C., Defendant: Thomas F. Myers, Garan Lucow (Detroit), Detroit, MI; Mark E. Shreve, Garan Lucow, Troy, MI.

For Macomb County, Macomb County Corporate Counsel, Defendants: James S. Meyerand, Macomb County Corporation Counsel, Mt. Clemens, MI.

For James S. Meyerland, Defendant: Jill K. Smith, Macomb County Corporation Counsel, Mt. Clemens, MI.

For G. Gus Morris, Cox, Hodgam and Glamarco, P.C., Defendants: Timothy J. Mullins, Cox, Hodgman, (Troy), Troy, MI.

For Clinton, Township of, Defendant: Molly A. Mack, Kupelian, Ormond, Southfield, MI.

Gregory T. Stremers, Touma, Watson, Whaling, Coury and Castello, P. C., Capac State Bank, Incorporated, Capac Bancorp, Incorporated, Joseph F. Salas, Defendants: Gregory T. Stremers, Touma, Watson, (Port Huron), Port Huron, MI.

[*2] For James R. Case, Kerr, Russell and Weber, P. L. C., Defendants: Stephen D. McGraw, Kerr, Russell, (Detroit), Detroit, MI.

JUDGES: DENISE PAGE HOOD, United States District Judge.

OPINION BY: DENISE PAGE HOOD

OPINION:

ORDER ACCEPTING REPORTS AND RECOMMENDATIONS

AND

ORDER REFERRING CASE TO MAGISTRATE JUDGE

I. BACKGROUND

This matter is before the Court on various Reports and Recommendations issued by Magistrate Judge Wallace Capel, Jr. Any appeal of or objections to a magistrate judge's Report and Recommendation must be made within ten (10) days of the entry of the Report, must

specify the part of the order the party objects to, and state the basis for the objection. *E.D. Mich. LR 72.1*; *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72(a)*. Objections that are only general and are not specific waive the right to appeal. *See Howard v. Secretary of HHS, 932 F.2d 505, 508-09 (6th Cir. 1991)*. The Court reviews *de novo* those portions of the Report to which objection is made. The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by a magistrate judge. *28 U.S.C. § 636(b)(1)*. To date, no Objections have been filed to the Report and Recommendation.

This is the fifth lawsuit filed by Plaintiff stemming from zoning disputes **[*3]** with the Village of Armada regarding his property and a raid on his property which occurred in April 1998. In the instant action, Plaintiff is suing some of the parties involved in the previous lawsuits and their counsel. Plaintiff alleges twelve counts in his Complaint: Libel (Counts I to IV); Civil Conspiracy to Obstruct Justice (Count V); *42 U.S.C. § 1983*, Conspiracy to Thwart Due Process by Obstructing Justice (Counts VI to X); Civil Conspiracy to Interfere and Deprive Plaintiff's *First Amendment* Rights (Count XI); and, Wanton Gross and Reckless Negligence (Count XII). Plaintiff bases his Complaint on four writings attached as Exhibits A through D to his Complaint. Exhibit A is a memorandum dated January 28, 2003 written by Defendant Nancy Parmenter, an Armada Village Council member, to the Council regarding the status of the case and indicating defense counsel's concerns about Plaintiff's mental health. Exhibit B is a letter dated January 24, 2003 written by Defendant Thomas F. Myers, counsel for the Village of Armada, to the Village's insurance adjuster, Meadowbrook Claims Service. The letter advises the insurance adjuster as to the status of settlement **[*4]** discussions. Exhibit C is an undated memorandum from Defendant Ralph Goode, Deputy Chief Investigator for the Macomb County Prosecutor's Office indicating Plaintiff is a possible dangerous subject. Plaintiff claims that this memorandum was published sometime in the year 2000. Exhibit D are minutes of a Special Council Meeting on July 30, 2001 indicating the Council met in Executive Session to discuss pending litigation.

II. ANALYSIS

A. Service

Magistrate Judge Capel issued a Report and Recommendation and Amended Report and Recommendation, both dated August 16, 2005 on three motions: 1) Thomas F. Myers and Garan Lucow Miller's Motion to Quash Plaintiff's Summons and Complaint and to Impose Sanctions; 2) James R. Case and Kerr, Russell, Weber, PLC's Motion to Quash Plaintiff's Summons and Complaint and to Impose Sanctions; and, 3) Mark L. Clark and McLean, Mijak & Clark P.C.'s Motion to Quash Summons and Dismiss Complaint for Lack of Service.

The Court has had an opportunity to review the Report and Recommendation and finds that the Magistrate Judge reached the correct conclusion for the proper reasons on the motions relating to service. The Court agrees with the **[*5]** Magistrate Judge that Plaintiff failed to properly serve the above-noted Defendants under *Fed. R. Civ. P. 4(e)* and *(h)* and M.C.R. 2.105(A) and (D). Plaintiff also failed to properly serve these Defendants within the 120-day time requirement under *Fed. R. Civ. P. 4(m)*.

The Court also agrees with the Magistrate Judge that these Defendants have not shown they are entitled to sanctions.

B. Motions to Dismiss and for Sanctions

Magistrate Judge Wallace Capel, Jr. issued a Report and Recommendation dated August 5, 2005 on three Motions to Dismiss and for Sanctions: 1) Defendant Clinton Township's Motion to Dismiss and for Sanctions; 2) Defendants G. Gus Morris and Cox, Hodgman and Giarmarco, P.C.'s Motion to Dismiss and for Sanctions; and 3) Defendants Gregory T. Stremers, Touma, Watson, Whaling, Coury & Costello, P.C., Capac State Bank, Inc., Capac Bancorp, Inc. and Joseph F. Salas' Motion to Dismiss Complaint and Impose Sanctions.

The Court has had an opportunity to review the Report and Recommendation and finds that the Magistrate Judge reached the correct conclusion for the proper reasons. The Court **[*6]** agrees with the Magistrate Judge that Plaintiff's libel counts, Counts I through IV, are barred by the statute of limitations. In Michigan, libel claims are governed by a one-year statute of limitations, *M.C.L. § 600.5805(7)*, which accrues from the time of publication, even though the person defamed has no knowledge of the publication. *M.C.L. § 600.5827*. The latest of the publications, as alleged by Plaintiff in his Complaint, was the January 28, 2003 memorandum by Defendant Parmenter. The instant suit was filed on November 2, 2004. Plaintiff's libel claims are barred by the statute of limitations, specifically, Counts I through IV. It is noted that although Counts V through XII are not titled "Libel" claims, the underlying facts supporting the claims involve the publication of the various writings set forth in Exhibits A through D of Plaintiff's Complaint. n1 Inasmuch as Counts V through XII allege libel claims, those claims are dismissed as well.

n1 *See:* Count V, PP 57-74; Count VI, PP 80-82; Count VII, PP 126-129; Count VIII, P 140; Count IX, P 147; Count X, P 152; Count XI, PP 157-158; and Count XII, PP 163-173.

[*7]

Counts V and XI allege Civil Conspiracy to Obstruct Justice and Conspiracy to Interfere and Deprive *First Amendment* Rights, respectively. As noted above, the underlying factual allegations are based on the publication of the writings set forth in Exhibits A through D. The Court agrees with the Magistrate Judge that civil conspiracy alone is not an actionable tort. *See Roche v. Blair, 305 Mich. 608, 614-16, 9 N.W.2d 861 (1943).* "In a civil action for damages resulting from wrongful acts alleged to have been committed in pursuance of a conspiracy, the gist or gravaman of the action is not the conspiracy but is the wrongful acts causing the damages." *Id. at 613-14; Gilbert v. Grand Trunk Western R.R., 95 Mich. App. 308, 313, 290 N.W.2d 426 (1980).* The conspiracy claims set forth in Counts V and XI must be dismissed because the allegations are based on libel claims set forth in Exhibits A through D of the Complaint which are barred by Michigan's one-year statute of limitations for libel actions.

Counts VI through X allege *42 U.S.C. § 1983* claims of obstruction of justice. The Court agrees with the Magistrate Judge that as to Defendant Clinton **[*8]** Township, a municipality cannot be held liable under *§ 1983* for an injury inflicted solely by its employees or agents without showing that a municipal policy or custom caused the injury. *See, Gregory v. Shelby County, Tenn., 220 F.3d 433, 441 (6th Cir. 2000).* Plaintiff's Complaint fails to identify a policy or custom by Defendant Clinton Township which was the moving force behind his alleged injury. *Board of County Comm'rs of Bryan County Okl. v. Brown, 520 U.S. 397, 404, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997).* As to the attorney Defendants who represented the parties in prior lawsuits filed by Plaintiff, the Court agrees with the Magistrate Judge that these Defendants are not state officials. A lawyer representing a client is not a state actor "under color of state law" within the meaning of *§ 1983. Polk County v. Dodson, 454 U.S. 312, 318, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1998); Catz v. Chalker, 142 F.3d 279, 289 (6th Cir. 1998).* The facts alleged by Plaintiff regarding the attorney Defendants relate to litigation strategy and actions while representing their clients. The *§ 1983* claims against the attorney Defendants and their firms must **[*9]** be dismissed because these Defendants are not state actors. It is further noted that Plaintiff has not identified any constitutional "obstruction of justice" right which he could allege under *§ 1983.* The federal obstruction of justice statute, *18 U.S.C. § 1503*, is a penal statute and does not create a private cause of action. *See Culberson v. Doan, 125 F. Supp. 2d 252, 279 (S.D. Ohio 2000).* Even if Plaintiff could show that these Defendants are state actors, because the federal obstruction of justice statute does not create a private cause of action, Plaintiff's obstruction of justice claims must be dismissed.

Count XII alleges a Wanton-Gross and Reckless Negligence claim. The Court agrees with the Magistrate Judge that the fact alleged in Count XII is based on a libel claim, which is barred by Michigan's libel one-year statute of limitations. Even if Plaintiff believes he has alleged some sort of gross negligence claim, evidence of ordinary negligence is insufficient to show gross negligence. *Maiden v. Rozwood, 461 Mich. 109, 122-23, 597 N.W.2d 817 (1999).* Plaintiff merely claims that Defendants' writings were grossly negligent. A plaintiff **[*10]** must demonstrate that the alleged gross negligence was "the sole" proximate cause of a plaintiff's injuries. *Robinson v. City of Detroit, 462 Mich. 439, 446-47, 613 N.W.2d 307 (2000).* Plaintiff's Complaint fails to allege that Defendants' gross negligence, if any, was the "the sole" proximate cause of Plaintiffs' injuries. Count 15 must be dismissed.

Defendants also claim that Plaintiff Complaint is barred by *res judicata.* Under the doctrine of *res judicata* or claim preclusion, a final judgment on the merits precludes a party from relitigating claims that were or which could have been asserted in an earlier action between the same parties. *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981), Sanders Confectionery Prods., Inc. v. Heller Fin, Inc., 973 F.2d 474, 480 (6th Cir. 1992). Res judicata* is established by four elements: 1) a final decision on the merits in an earlier action by a court of competent jurisdiction; 2) the later action involves the same parties or their privies; 3) the later action raises issues that were or could have been asserted in the earlier action; and 4) there is an identity of the causes of action. **[*11]** *Sanders Confectionery, 973 F.2d at 480.* As to the first element, the Court entered a final decision on the merits in the earlier cases, Case Nos. 01-CV-71353-DT and 02-CV-71696-DT. As to the second element, some of the parties are the same. Although some of the parties are not the same, the newly-named Defendants were counsel to the parties in the previous lawsuits. Although the claims in the instant suit are based on alleged libelous writings by Defendants, Plaintiff's Complaint also seeks to revisit the claims involving zoning issues and the police raid on his property, which have been ruled-upon by the Court in the previous lawsuits, as noted above. Inasmuch as Plaintiff is seeking review of the Court's previous rulings in the prior lawsuits, those claims are barred by *res judicata.*

The Court agrees with the Magistrate Judge that these Defendants have not shown they are entitled to sanctions because they have failed to identify a statute which allows such sanctions and Defendants have not followed the provisions under *Rule 11* of the Rules of Civil Procedure for sanctions.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Magistrate **[*12]** Judge Capel's Report and Recommendation **(Docket No. 33, filed August 16, 2005)**, as amended by an Amended Report and Recommendation on August 16, 2005 **(Docket No. 34, filed August 16, 2005)** is ACCEPTED and ADOPTED as this Court's findings and conclusions of law.

IT IS FURTHER ORDERED that Defendants Thomas F. Myers and Garan, Lucow, Miller, P.C.'s Motion to Quash Plaintiff's Summons and Complaint is GRANTED and their Motion to Impose Sanctions is DENIED. **(See, Docket No. 6, filed March 16, 2005)**

IT IS FURTHER ORDERED that Defendants Mark L. Clark and McLean, Mijak and Clark, P.C.'s Motion to Dismiss and to Quash **(Docket No. 9, filed March 18, 2005)** is GRANTED.

IT IS FURTHER ORDERED that Defendants Kerr, Russell and Weber, P.L.C. and James R. Case's Motion to Quash Plaintiff's Summons and Complaint is GRANTED and their Motion to Impose Sanctions is DENIED. **(See, Docket No. 11, filed March 21, 2005)**

IT IS ORDERED that Magistrate Judge Capel's Report and Recommendation **(Docket No. 32, filed August 5, 2005)** is ACCEPTED and ADOPTED as this Court's findings and conclusions of law.

IT IS FURTHER ORDERED that Defendants Gregory T. Stremers, Touma, Watson, **[*13]** Whaling, Coury & Costello, P.C., Capac State Bank, Inc., Capac Bancorp, Inc. and Joseph F. Salas' Motion to Dismiss Complaint is GRANTED and their Motion to Impose Sanctions is DENIED **(Docket No. 16, filed March 24, 2005)**.

IT IS FURTHER ORDERED that Defendant Clinton Township's Motion to Dismiss is GRANTED and their Motion for Sanctions is DENIED **(Docket No. 26, filed April 25, 2005)**.

IT IS FURTHER ORDERED that Defendants G. Gus Morris and Cox, Hodgman and Giarmarco, P.C.'s Motion to Dismiss is GRANTED and for Sanctions is DENIED **(Docket No. 28, filed April 29, 2005)**.

IT IS FURTHER ORDERED that the Complaint is DISMISSED only as to the following Defendants: Thomas F. Myers; Garan, Lucow, Miller, P.C.; Mark L. Clark; McLean, Mijak and Clark, P.C.; Kerr, Russell and Weber, P.L.C; James R. Case; Clinton Township; G. Gus Morris and Cox, Hodgman and Giarmarco; Gregory T. Stremers; Touma, Watson, Whaling, Coury & Costello, P.C.; Capac State Bank, Inc.; Capac Bancorp, Inc.; and, Joseph F. Salas.

IT IS FURTHER ORDERED that this matter is REFERRED BACK to the Magistrate Judge for all pre-trial proceedings, including issuing a scheduling order, ruling on any non-dipositive **[*14]** motions and issuing a Report and Recommendation on any dispositive motion. The remaining Defendants are: Armada Village, Inc., Nancy Parmenter, Joseph Golembiewski, Robert Standfest, Meadowbrook Claims Service, Macomb County, Macomb County Corporate Counsel, James S. Meyerland, Ralph Goode, and John Doe. n2

n2 An appearance has been filed on behalf of Macomb County, Macomb County Corporate Counsel and James S. Meyerland. There is no indication on the record whether the remaining Defendants (Armada Village, Inc., Nancy Parmenter, Joseph Golembiewski, Robert Standfest, Meadowbrook Claims Service, Ralph Goode and John Doe) have been served.

/s/ DENISE PAGE HOOD

United States District Judge

DATED: October 25, 2005

ADDENDUM D

1 of 1 DOCUMENT

MICHAEL DOUGLAS SMITH, JR., Personal Representative of the Estate of SHANNON LOUISE RANDOLPH, Deceased, Plaintiff-Appellee, v THOMAS RANDOLPH, JR., Defendant-Appellant.

No. 251066

COURT OF APPEALS OF MICHIGAN

2005 Mich. App. LEXIS 825

March 24, 2005, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

SUBSEQUENT HISTORY: Stay granted by, Review pending at, Motion granted by *Smith v. Randolph, 699 N.W.2d 302, 2005 Mich. LEXIS 1093* (Mich., 2005)
Appeal denied by, *Remanded by Smith v. Randolph, 2006 Mich. LEXIS 1187* (Mich., June 7, 2006)

PRIOR HISTORY: Wayne Circuit Court. LC No. 02-235928-NO.

DISPOSITION: Affirmed in part and reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

JUDGES: Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

OPINION: PER CURIAM.

Defendant appeals as of right an order denying his motion for summary disposition pursuant to *MCR 2.116(C)(7)*(claim barred by the statute of limitations), granting plaintiff's motion for summary disposition pursuant to *MCR 2.116(C)(10)*, and entering judgment in favor of plaintiff for $ 750,000. We affirm in part and reverse and remand in part.

Plaintiff commenced this wrongful-death action on October 4, 2002, alleging that defendant was liable for the January 8, 1982, shooting death of plaintiff's decedent, who was defendant's wife. n1 Defendant first argues that the trial court erred in determining that plaintiff's action was not barred by the statute of limitations. We disagree, but for reasons other than those stated by the trial court and argued by plaintiff.

n1 Plaintiff is the adult child of the deceased.

[*2]

The limitations period for a wrongful-death action is three years. *MCL 600.5805(10)*. Because plaintiff's decedent was fatally shot on January 8, 1982, and plaintiff did not file this action until October 4, 2002, the cause of action was prima facie barred. Therefore, plaintiff had the burden of showing the facts necessary to avoid the operation of the statute of limitations. *Warren Consolidated Schools v W R Grace & Co, 205 Mich. App. 580, 583; 518 N.W.2d 508 (1994)*. In response to defendant's motion for summary disposition, plaintiff relied in part on the fraudulent concealment statute, *MCL 600.5855*, which provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise **[*3]** be barred by the period of limitations.

Plaintiff argued, and the trial court agreed, that this statute was applicable and that the two-year limitations period did not begin to run until November 19, 2001, which was the date that defendant was convicted of decedent's murder.

To seek recourse under the fraudulent concealment statute, plaintiff was required to plead in his complaint the acts or misrepresentations that comprised the fraudulent concealment, and he had to prove that defendant "committed affirmative acts of misrepresentations that were designed to prevent subsequent discovery." *Phinney v Perlmutter, 222 Mich. App. 513, 562-563; 564 N.W.2d 532 (1997).* We find that plaintiff's complaint sufficiently referenced acts and misrepresentations giving rise to fraudulent concealment. The complaint alleged that defendant gave police an account of the crime that was illogical and which contained inconsistencies. Plaintiff further alleged that defendant had his wife's remains cremated over the objection of family members. Additionally, it was alleged that defendant sued the shopping mall where the murder was committed and that he settled the suit in **[*4]** 1983 for more than $ 70,000. Finally, plaintiff alleged that in December 1999, a person, not defendant, came forward with information implicating defendant in the crime. In sum, these allegations suggest that defendant lied to the police about the murder, that defendant hoped to hamper further investigation by having the body cremated, that defendant successfully sought to hold others civilly liable for the homicide while hiding his own duplicitous involvement, that defendant did not reveal his involvement in the murder, and that it took police contact by another person to initiate the prosecution. Therefore, plaintiff pled acts and misrepresentations comprising fraudulent concealment.

With respect to evidentiary support for purposes of summary disposition, in reviewing a motion under *MCR 2.116(C)(7)*, the allegations in the complaint are accepted as true unless contradicted by documentary evidence submitted by the movant. *Maiden v Rozwood, 461 Mich. 109, 119; 597 N.W.2d 817 (1999).* No documentary evidence was attached to defendant's lower court briefs regarding summary disposition; thus, the factual allegations in the complaint are accepted as true. And, **[*5]** as noted above, the allegations sufficiently referenced acts and misrepresentations that comprise fraudulent concealment. Moreover, the evidence is indisputable that defendant was convicted of the murder, that he did not reveal or disclose any involvement in the murder and avoided prosecution, and that the murder conviction occurred nearly twenty years after the murder was committed. There is no genuine issue of fact concerning the existence of fraudulent concealment. Indeed, in defendant's summary disposition brief, he conceded that plaintiff "had up until July 20, 2002[,] to file any wrongful death claim based on fraudulent concealment." Defendant was arrested for the murder in July 2000.

Nevertheless, the trial court's determination that the date of defendant's conviction is controlling for purposes of the fraudulent concealment statute does not find support in the law. *MCL 600.5855* provides that the two-year time period begins when a person "discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim . . . ." Contrary to the trial court's reasoning, it cannot be said that a plaintiff "should **[*6]** have discovered . . . the identity of the person who is liable for the claim" only at a point in time when a finder of fact is convinced of the person's identity as the perpetrator of a crime beyond a reasonable doubt. Where other requirements for fraudulent concealment are established, a plaintiff would be able to successfully argue that the two-year period does not begin until there is certainty beyond a reasonable doubt of the wrongdoer's identity. This level of certainty is not reflected in this Court's decisions addressing the statute. See, e.g., *Witherspoon v Guilford, 203 Mich. App. 240, 248-249; 511 N.W.2d 720 (1994)*(rejecting fraudulent concealment where the defendant driver's name and description were in a police report and "her identity and potential for liability were therefore discoverable from the outset.")

Regardless whether the two-year window found in the fraudulent concealment statute commenced in July 2000 on defendant's arrest, as maintained by defendant, or in August 2000 when the district court bound defendant over to the circuit court after making the requisite probable cause finding, the initiation of the suit at bar on October 4, 2002, was **[*7]** untimely taking solely into consideration the general statute of limitations for wrongful death, *MCL 600.5805(10)*, and the fraudulent concealment statute, *MCL 600.5855*. n2 Nonetheless, we conclude that *MCL 600.5852* saves plaintiff's cause of action.

n2 We also reject plaintiff's alternative argument that the action was timely under the discovery rule. Generally, a claim accrues at the time of the wrong. *MCL 600.5827.* Where an element of a cause of action has occurred, but cannot be pleaded in a proper complaint because it is not yet discoverable with reasonable diligence, courts have applied the discovery rule. *Travelers Ins Co v Guardian Alarm Co of Michigan, 231 Mich. App. 473, 479-480; 586 N.W.2d 760 (1998).* Under this rule, a claim accrues when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. *Solowy v Oakwood Hosp Corp, 454 Mich. 214, 222; 561 N.W.2d 843 (1997); Moll v Abbott Laboratories, 444 Mich. 1, 23-25; 506 N.W.2d 816 (1993).* Significantly, the rule does not pertain to discovering the identities of all possible parties. *Brown v Drake-Willock Int'l, Ltd, 209 Mich. App. 136, 142; 530 N.W.2d 510 (1995).*

> "Our courts consistently have held that the statute of limitations is not tolled pending discovery of the identity of the parties where all the elements of the cause of action exist." *Id.* In this case, the elements of the cause of action were apparent when plaintiff's decedent was shot and killed in 1982. Thus, contrary to plaintiff's discovery rule argument, the statute of limitations was not tolled until defendant's identity as the perpetrator was ascertained.

[*8]

MCL 600.5852 provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

Here, the deceased died before the period of limitations elapsed. Furthermore, plaintiff, as personal representative, obtained letters of authority on October 4, 2002, which is the date the suit was commenced, thereby satisfying the requirement that an action be initiated within two years after letters of authority are issued. The fact that the letters of authority issued in 2002 related to a death that occurred as far back as 1982 is irrelevant under our Supreme Court's ruling in *Eggleston v Bio-Medical Applications of Detroit, Inc, 468 Mich. 29; 658 N.W.2d 139 (2003).* The *Eggleston* Court, construing *MCL 600.5852* **[*9]** , ruled:

> The Court [of Appeals held] that a personal representative must bring an action within two years after the initial letters of authority are issued to the first personal representative. This is not, however, what the statute says. The statute simply provides that an action may be commenced by the personal representative "at any time within 2 years after letters of authority are issued although the period of limitations has run." The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative.
>
> Plaintiff was "the personal representative" of the estate and filed the complaint "within 2 years after letters of authority [were] issued," and "within 3 years after the period of limitations had run." *MCL 600.5852.* The action was therefore timely. [*Eggleston, supra at 33* (citation omitted; alteration in first paragraph added).]

In the case at bar, plaintiff is the personal **[*10]** representative, and he filed the complaint within two years after letters of authority were issued. Accordingly, there was compliance with this statutory requirement. n3

> n3 If in fact a probate estate was opened immediately following decedent's death, the record does not reveal the nature and circumstances of the probate action. Regardless, the information is unnecessary for purposes of our analysis.

We now tackle the language of *MCL 600.5852* that requires the action to be brought "within 3 years after the period of limitations has run." The general period of limitations, three years under *MCL 600.5805(10)*, elapsed in 1985, giving the estate until 1988 to file suit under § 5852; this was not accomplished. However, § 5852 does not provide that a personal representative must file suit within three years after the "general" period of limitations has run. The statute simply says that the action must be commenced "within 3 years after *the* period of limitations **[*11]** has run." (Emphasis added). In *Miller v Mercy Mem Hosp, 466 Mich. 196, 202; 644 N.W.2d 730 (2002),* the Michigan Supreme Court held that § 5852's reference to "the" period of limitations does not limit or qualify which period applies, the period rooted in *MCL 600.5805*, or the six-month discovery period in *MCL 600.5838a(2)*, which was at issue in *Miller,* a medical malpractice action. "As a saving statute, § 5852 applies to whatever period of limitation is or may be applicable in a given case[.]" *Miller, supra at 202.* The Court further reasoned:

> Contrary to defendants' assertions, the six-month discovery rule is a distinct period of limitation. It is a statutory provision that requires a person who has a cause of action to bring suit within a specified time. As an alternative to the

other periods of limitation, it is itself a period of limitation. [*Id.*]

Likewise, the fraudulent concealment statute, *MCL 600.5855*, contains a distinct two-year limitations period that is an alternative to *MCL 600.5805*. Because **[*12]** of the applicability of the fraudulent concealment statute, the period of limitations did not run until July 2002, assuming that it commenced as early as July 2000 when defendant was arrested. n4 Applying § 5852, three additional years are added from July 2002, during which period the personal representative, plaintiff, could initiate the action, as long as he was issued letters of authority within two years of the suit's commencement as is the case. Accordingly, plaintiff's action was timely and not time-barred.

n4 Even were we to go back to December 1999 when an individual informed police of defendant's involvement in the murder, and assuming knowledge, actual or constructive, on plaintiff's part, the outcome remains the same, i.e., the action was timely under § 5852.

With respect to defendant's civil liability, we find no error in the trial court's order granting summary disposition in favor of plaintiff. Defendant did not dispute the fact of his conviction for the murder of plaintiff's decedent. Although **[*13]** he claims on appeal that the evidence supporting the conviction was untrustworthy, he failed to present any documentary evidence to the trial court to show that there was a genuine issue of material fact regarding his liability. *MCR 2.116(C)(10)*; *Maiden, supra at 120.* Accordingly, the trial court could properly conclude that plaintiff was entitled to summary disposition on the issue of liability in light of the criminal conviction for murder. See *Waknin v Chamberlain, 467 Mich. 329, 332-336; 653 N.W.2d 176 (2002)*(criminal conviction after plea or trial constitutes admissible substantive evidence of conduct at issue in a civil case arising out of the same transaction). n5

n5 The *Waknin* Court stated that the fact that the "defendant was found guilty beyond a reasonable doubt - a standard of proof granting him protection greater than the preponderance of the evidence standard in the civil case - is highly probative evidence." *Waknin, supra at 335-336.*

[*14]

Finally, we address the issue of damages. Plaintiff had not requested that the trial court determine damages. The record indicates that the trial court acted after an unrecorded sidebar conference with the attorneys. It is not clear that defendant had an opportunity to oppose the trial court's decision beforehand. There is no basis on which to conclude that defendant waived his right to a jury trial on the issue of damages by his conduct. See *Marshall Lasser, PC v George, 252 Mich. App. 104, 107-109, 651 N.W.2d 158 (2002).* We conclude that the trial court improperly determined damages in violation of defendant's right to a jury trial. Plaintiff filed a demand for a jury trial at the time the complaint was filed. The general jury demand is for all facts and issues, including damages. *Id. at 106.* Defendant was entitled to rely on that demand. *Id.* "Once the right to trial by jury was secured, plaintiff needed defendant's consent to waive or withdraw the right to have the jury hear and decide the issue of damages." *Id.* (citations omitted). The record does not show, and plaintiff does not assert, that defendant waived or withdrew his right to **[*15]** a jury trial on the issue of damages. Moreover, there was no documentary evidence that would support the damage award ordered by the trial court. Therefore, the trial court improperly determined damages. On remand, unless the parties agree otherwise, a jury shall determine the amount of damages.

Affirmed in part and reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ William B. Murphy

/s/ Mark J. Cavanagh

ADDENDUM E

1 of 1 DOCUMENT

CHRISTINE TEBO and KATHLEEN CAURDY, Co-Personal Representatives of the Estate of ANNA MARIE TURETZKY, Deceased, Plaintiffs-Appellants, v JASUBHAI DESAI and KINGSWAY MEDICAL CLINIC, Defendants-Appellees, and STEPHAN ADAMS, Defendant.

No. 212379

COURT OF APPEALS OF MICHIGAN

2000 Mich. App. LEXIS 1217

December 15, 2000, Decided

NOTICE: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Wayne Circuit Court. LC No. 95-511105 NZ.

DISPOSITION: Affirmed.

JUDGES: Before: Bandstra, C.J., and Gage and Wilder, JJ.

OPINION: PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting, on reconsideration, defendants' motion for summary disposition under *MCR 2.116(C)(7)*. The trial court held that plaintiffs' wrongful death action based on their mother's murder was barred by the period of limitations. We affirm.

The decedent was murdered in November 1983. Plaintiffs alleged that Desai, who was the decedent's business partner, solicited Adams to commit the murder in order to obtain the decedent's share of the business and the proceeds from the decedent's life insurance policies that named Desai as the beneficiary. In 1995, defendants Desai and Adams eventually were charged with the decedent's murder. Although the trial court initially dismissed the criminal charges against Desai and Adams, this Court reversed the trial court and remanded the case for further proceedings. *People v Adams, 232 Mich App 128; 591 NW2d 44 (1998).* [*2]

Plaintiffs brought the instant action in 1995, well after the expiration of the three-year wrongful death period of limitations. *MCL 600.5805(8)*; MSA 27A.5805(8). Plaintiffs maintained that the period of limitations was tolled, however, because defendants fraudulently concealed their involvement in the decedent's murder. *MCL 600.5855*; MSA 27A.5855. The trial court initially denied defendants' motion for summary disposition, instead allowing plaintiffs to amend their complaint to specifically plead defendants' acts of fraudulent concealment. On reconsideration, the trial court granted defendants' motion for summary disposition, holding that plaintiffs failed to specifically plead any affirmative acts of fraudulent concealment and that plaintiffs had knowledge of defendants' identity and potential liability within the period of limitations, rendering § 5855's tolling provision inapplicable.

We review for an abuse of discretion the trial court's decision on a motion for reconsideration. *In re Beglinger Trust, 221 Mich App 273, 279; 561 NW2d 130 (1997).* Whether a claim is barred by the statute of limitations, [*3] however, is a question of law that we review de novo. *Jackson Co Hog Producers v Consumers Power Co, 234 Mich App 72, 77; 592 NW2d 112 (1999).*

Section 5855 allows the relevant limitations period to be tolled in cases of fraudulent concealment. It provides as follows:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would other-

wise be barred by the period of limitations.

This tolling provision "is designed to prevent actions which hinder a plaintiff from discovering the existence of a claim." *Stroud v Ward, 169 Mich App 1, 7-8; 425 NW2d 490 (1988).*

To invoke the tolling provision, "there must be concealment by the defendant of the existence of a claim or the identity of a potential defendant." **[*4]** *McCluskey v Womack, 188 Mich App 465, 472; 470 NW2d 443 (1991).* The fraudulent concealment "must be manifested by an affirmative act or misrepresentation." *Witherspoon v Guilford, 203 Mich App 240, 248; 511 NW2d 720 (1994).* A defendant's mere silence is not enough to establish fraudulent concealment. *Dowse v Gaynor, 155 Mich 38, 43; 118 NW 615 (1908); Sills v Oakland General Hospital, 220 Mich App 303, 310; 559 NW2d 348 (1996).* "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action." *De Haan v Winter, 258 Mich 293, 296; 241 NW 923 (1932).* Thus, to avoid summary disposition, the plaintiff "must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Phinney v Perlmutter, 222 Mich App 513, 562-563; 564 NW2d 532 (1997).*

In this case, plaintiffs failed to plead in their complaint any specific acts or misrepresentations of defendants that fraudulently **[*5]** concealed from plaintiffs the existence of the wrongful death claim. Plaintiffs argue that defendants' failure to reveal their involvement in the decedent's death, as well as their affirmative denial of involvement, constitutes fraudulent concealment. Neither defendants' silence nor defendants' denials of wrongdoing, however, qualify as affirmative fraudulent concealment. *Sills, supra; Lemson v General Motors Corp, 66 Mich App 94, 98; 238 NW2d 414 (1975).* Moreover, defendants did not have an affirmative duty to disclose information because they were not plaintiffs' fiduciaries. n1 *Bradley v Gleason Works, 175 Mich App 459, 462-463; 438 NW2d 330 (1989).* We therefore conclude that the trial court properly determined that plaintiffs failed to plead acts constituting fraudulent concealment.

n1 Plaintiffs also argue that the "affirmative acts" requirement should not be followed, since it is not contained in the language of the statutory tolling provision. We must, however, follow binding precedent. *MCR 7.215(H)(1); People v Beasley, 239 Mich App 548, 556; 609 NW2d 581 (2000).*

[*6]

Furthermore, the tolling provision is not available to a plaintiff who knew or should have known about the existence of the claim and the defendant's potential liability. *McCluskey, supra at 472-473.* The details of the evidence necessary to prove the claim need not be known; all that is required is that the plaintiff know that the claim exists. *Eschenbacher v Hier, 363 Mich 676, 682; 110 NW2d 731 (1961).* In this case, evidence showed that plaintiffs as early as 1984 suspected that defendants killed the decedent, and investigated and collected information about defendants' involvement in the crime. Plaintiffs thus knew or should have known of defendants' potential liability well within the period of limitations, and therefore could not invoke § 5855's tolling provision. n2

n2 Plaintiffs' argument that they would have been subject to sanctions for filing a frivolous claim had they brought the action in 1984 was not presented to the trial court and is therefore not preserved for our review. *Fast Air, Inc v Knight, 235 Mich App 541, 549; 599 NW2d 489 (1999).*

[*7]

For the foregoing reasons, the action was barred by the period of limitations. *MCL 600.5805(8);* MSA 27A.5805(8). Therefore, we conclude that the trial court correctly granted defendants' motion for reconsideration and granted defendants summary disposition pursuant to *MCR 2.116(C)(7).*

Affirmed.

/s/ Richard A. Bandstra

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

ADDENDUM F

LEXSEE 2004 KY APP LEXIS 188

MICHAEL L. DIGIURO, ADMINISTRATOR OF THE ESTATE OF TRENT DIGIURO APPELLANT v. SHANE RAGLAND APPELLEE

NO. 2003-CA-001555-MR

COURT OF APPEALS OF KENTUCKY

2004 Ky. App. LEXIS 188

June 25, 2004, Rendered

NOTICE: [*1] THIS OPINION IS NOT FINAL AND SHALL NOT BE CITED AS AUTHORITY IN ANY COURTS OF THE COMMONWEALTH OF KENTUCKY.

SUBSEQUENT HISTORY: Related proceeding at *Ragland v. Commonwealth, 2004 Ky. LEXIS 284 (Ky., Nov. 18, 2004)*
Review granted by *Ragland v. Digiuro, 2005 Ky. LEXIS 118 (Ky., Apr. 13, 2005)*

PRIOR HISTORY: APPEAL FROM FAYETTE CIRCUIT COURT HONORABLE LAURANCE B. VANMETER, JUDGE ACTION NO. 02-CI-02669.

DISPOSITION: Reversed and remanded.

COUNSEL: BRIEF FOR APPELLANT: F. Thomas Conway Nicole H. Pang Louisville, Kentucky.

BRIEF FOR APPELLEE: J. Guthrie True Johnson, Judy, True & Guarnieri, LLP Frankfort, Kentucky.

JUDGES: BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES. TAYLOR, JUDGE, CONCURS. BUCKINGHAM, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

OPINION BY: DYCHE

OPINION: OPINION

REVERSING

DYCHE, JUDGE. In this matter, we are asked to review summary judgment entered on behalf of appellee, Shane Ragland, by the Fayette Circuit Court. We reverse.

Trent DiGiuro, a student at the University of Kentucky, was killed by a single gunshot wound on July 17, 1994, while sitting on his front porch during a party celebrating his twenty-first birthday. His murder went unsolved for many years. However, in January of 2000, Shane Ragland was identified by his ex-girlfriend as Trent's killer. According to the affidavit of Detective Don Evans, Shane murdered Trent because Trent had prevented Shane from becoming a member of a campus [*2] fraternity.

Shane was arrested for Trent's murder on July 14, 2000. A preliminary hearing was held on July 19, 2000; the trial court found probable cause to believe that Shane had committed the crime. Shane was thereafter indicted on August 29, 2000, by a grand jury of the Fayette Circuit Court. On March 27, 2002, a jury found him guilty of Trent's murder, and he was sentenced to thirty years in prison.

Trent's father, Michael L. DiGiuro, was appointed Administrator of Trent's estate on April 24, 2001, and he filed the instant action for wrongful death on July 1, 2002. n1 Initially, the case was assigned to Circuit Court Judge Gary Payne, who, without comment, denied a motion to dismiss the case as being time-barred. This matter was then transferred to Judge VanMeter, who determined on summary judgment that the wrongful death action was indeed time-barred.

n1 We note that the original complaint in this action was not signed, and there is no amended complaint. Apparently, this was not brought to the trial court's attention. Because the matter has been litigated to this point without this having been brought up and in the absence of any type of allegations invoking Rule 11, we find no harm at this point. However, upon remand, the trial court

> should direct the plaintiff to file a signed amended complaint.

[*3]

The trial court's rationale was that Trent's estate should have:

> discovered "not only that [Trent] has been injured but also that his injury may have been caused by the defendant's conduct," and based on the fact that after the arrest, preliminary hearing and indictment, the defendant was no longer concealed or obstructing prosecution of a wrongful death action, this Court is unable to escape the conclusion that the plaintiff knew or should have known no later than July 19, 2000, the date of the preliminary hearing in Fayette District Court, not only that he had been injured, but that his injury **may been have caused** by the defendant's conduct. The case law is clear that certainty is not required, and the presence or absence of a criminal proceeding or conviction of the defendant has no bearing on the running of the statute of limitations for a civil action based on the same facts and circumstances.

(T.R. p. 254)(emphasis in original).

Mr. DiGiuro has appealed this ruling, arguing that this action should not be barred as untimely and that the time for bringing it should have been tolled until Shane was convicted. We are faced with a difficult issue borne from **[*4]** an unsettling factual background.

"At common law, when the tortfeasor killed, rather than seriously injured his victim, he was immune from civil action. Wrongful death statutes were therefore adopted to reverse this result." *Conner v. George W. Whitesides Co., Ky., 834 S.W.2d 652, 655, 39 6 Ky. L. Summary 23 (1992)* (Stephens, C.J., dissenting). Kentucky has had several versions of wrongful death statutes, some of which have included time limitations. The present version of Kentucky's wrongful death statute does not, however. It states as follows:

> Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

KRS 411.130(1).

Kentucky courts have routinely applied a one-year statute of limitations period to wrongful death cases using the general limitation period in *KRS 413.140. Conner, 834 S.W.2d at 654.* **[*5]** The Court in Conner cited *Carden v. Louisville & N.R. Co., 101 Ky. 113, 39 S.W. 1027, 19 Ky. L. Rptr. 132 (1897)*, for this holding. However, in the Carden case, the relevant statute at that time, the Death Act, included an express one-year statute of limitations, whereas the current statute does not. See *Nichols v. Chesapeake & O. Ry. Co., 195 F. 913, 917 (6th Cir. 1912).*

KRS 413.140 reads as follows:

> (1) The following actions shall be commenced within one (1) year after the cause of action accrued:
>
> (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant . . . .

Clearly, however, *KRS 413.140* on its face does not include wrongful deaths. Nonetheless, the Supreme Court of Kentucky has held that "death is simply the final injury to a person." *Conner, 834 S.W.2d at 654.*

KRS 413.180 provides the time limitations for a personal representative of the deceased to bring a cause of action. This statute provides in relevant part that:

> (1) If a person entitled to bring any action mentioned in *KRS 413.090* **[*6]** *to 413.160* dies before the expiration of the time limited for its commencement and the cause of action survives, the action may be brought by his personal representative after the expiration of that time, if commenced within one (1) year after the qualification of the representative.
>
> (2) If a person dies before the time at which the right to bring any action mentioned in *KRS 413.090 to 413.160* would have accrued to him if he had continued alive, and there is an interval of more than one (1) year between his death and the qualification of his personal representative, that representative, for purposes of this chapter, shall be deemed to have

> qualified on the last day of the one-year period.

This statute on its face limits its scope to actions "mentioned" in *KRS 413.090 to 413.160*, which does not include the wrongful death statute. Nonetheless, the Court in *Conner, 834 S.W.2d at 653-54*, held that, although the wrongful death statute was not explicitly included in *KRS 413.180*, wrongful death actions fall under its umbrella because *KRS 413.140* has long been recognized **[*7]** as establishing a one-year limitation for wrongful death actions, and it is specifically included in *KRS 413.180*.

Having reviewed the relevant statutes at issue, our attention now turns to statutory construction factors and the purpose of statutes of limitations. "Although the previous rule in Kentucky was that statutes of limitations should be strictly construed, *Newby's Adm'r v. Warren's Adm'r, 277 Ky. 338, 126 S.W.2d 436 at 437 (1939)*, *KRS 446.080* provides that 'all statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature . . . .'" *Plaza Bottle Shop, Inc. v. Al Torstrick Ins. Agency, Inc., Ky. App., 712 S.W.2d 349, 351 (1986)*. Nonetheless, statutes of limitations should not be "lightly evaded" either. *Munday v. Mayfair Diagnostic Lab., Ky., 831 S.W.2d 912, 914, 39 5 Ky. L. Summary 44 (1992)* (citing *Fannin v. Lewis, Ky., 254 S.W.2d 479, 481 (1952))*.

"'The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.'" *Travelers Indemnity Co. v. Reker, Ky., 100 S.W.3d 756, 763 (2003)* **[*8]** (quoting *Kentucky Ins. Guar. Ass'n v. Jeffers, Ky., 13 S.W.3d 606, 610 (2000))*. We "must consider 'the intended purpose of the statute--the reason and spirit of the statute--and the mischief intended to be remedied.'" *Commonwealth v. Kash, Ky. App., 967 S.W.2d 37, 43-44, 44 14 Ky. L. Summary 2 (1997)* (quoting *City of Louisville v. Helman, Ky., 253 S.W.2d 598, 600 (1952))*. "The Kentucky General Assembly and [the Supreme] Court [of Kentucky] have long recognized the value of statutes which 'bar stale claims arising out of transactions or occurrences which took place in the distant past.'" *Munday, supra at 914* (citing *Armstrong v. Logsdon, Ky., 469 S.W.2d 342, 343 (1971))*.

The Supreme Court of the United States has stated that "'statutes of limitation find their justification in necessity and convenience rather than in logic. . . . They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.'" *Mills v. Habluetzel, 456 U.S. 91, 102, 71 L. Ed. 2d 770, 102 S. Ct. 1549 (1982)* **[*9]** (quoting *Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314, 89 L. Ed. 1628, 65 S. Ct. 1137 (1945))*.

There can be no doubt that statutes of limitations can be arbitrary and sometimes operate to halt legitimate claims. See *Simmons v. South Central Skyworker's, Inc., 936 F.2d 268, 270 (1991)* (citing *Schiavone v. Fortune, 477 U.S. 21, 31, 91 L. Ed. 2d 18, 106 S. Ct. 2379 (1986))*. However, to prevent such a harsh application, both the courts and the legislature have carved out exceptions to this rule. We quote from *Munday, 831 S.W.2d at 914-915* on this as follows:

> Parties are at liberty to contract for a limitation period less than the period fixed by statute. *Johnson v. Clavert Fire Ins. Co., 298 Ky. 669, 183 S.W.2d 941 (1945)*. Likewise, after a cause of action has accrued, parties may, by agreement, extend the time for filing the action beyond the time in which the limitation would otherwise run. *Bancokentucky Co.'s Receiver v. National Bank of Kentucky's Receiver, 281 Ky. 784, 137 S.W.2d 357, 369 (1939)*. An estoppel may arise to prevent a party from relying on a statute of limitation by virtue of a false **[*10]** representation or fraudulent concealment. *Cuppy v. General Accident Fire and Life Assurance Corp., Ky., 378 S.W.2d 629 (1964)*. And for persons under a legal disability, the running of the statute of limitations ordinarily does not commence until the disability is removed. *Gunnels v. Stanley, 296 Ky. 662, 178 S.W.2d 195 (1944)*. Finally, we have held that as statutes of limitations are in derogation of presumptively valid claims, when doubt exists as to which statute should prevail, the longer period should be applied. *Troxell v. Trammell, Ky., 730 S.W.2d 525 (1987)*.
>
> A claim of equitable estoppel is widely utilized by parties who seek to avoid a statute of limitation defense. Long ago a tolling statute was enacted which provides that a resident of this State who absconds or conceals himself "or by any other indirect means obstructs the prosecution of the action" shall not have benefit of the statute of limitation so long as the obstruction continues. *KRS 413.190(2)*. We have held that this tolling statute is simply a recognition in law of an equitable estop-

pel or estoppel in pais to prevent fraudulent **[*11]** or inequitable application of a statute of limitation. *Adams v. Ison, Ky., 249 S.W.2d 791 (1952)*. Our decisions construing the statute and applying equitable estoppel appear to require "some act or conduct which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so." *Id. at 792*. In *Second National Bank and Trust Co. v. First Security National Bank and Trust Co., Ky., 398 S.W.2d 50 (1966)*, we held that fraudulent conduct or concealment could not be assumed in the absence of evidence to support it.

Ordinarily, proof of fraud requires a showing of an affirmative act by the party charged. An exception to this general rule may be found in a party's silence when the law imposes a duty to speak or disclose. Such was the case in *Security Trust Co. v. Wilson, 307 Ky. 152, 210 S.W.2d 336 (1948)*, in which it was alleged that a deceased uncle who had served as fiduciary for his niece had converted her property to his own use. The Court emphasized the language in *KRS 413.190* "by any other indirect means" and stated:

> "The indirect **[*12]** means employed by the uncle in the case at Bar, if it existed, was a failure to speak and advise his niece that he had exchanged her bonds for other bonds and taken the title in his own name." *Id. at 339*.
>
> The Court relied on *Kurry v. Frost, 204 Ark. 386, 162 S.W.2d 48 (1942)*, which held that a party who, in violation of the law, left the scene of an automobile accident after striking another person, "concealed her identity." The Court in Wilson held that the law imposed upon the uncle a duty of disclosure to his niece as follows:
>
> > "that this fiduciary relationship was such that there was a duty upon the part of the said Curtis to advise the said plaintiff that he had exchanged her bonds and taken the title to the ones exchanged for in his own name; that this concealment constituted a means of obstruction within the meaning of *KRS 413.190*, and that this concealment tolled the running of the statute of limitations." *Security Trust Co., 210 S.W.2d at 339-40*.

The "discovery rule" is also a judicially created exception first adopted in this Commonwealth in *Tomlinson v. Siehl, Ky., 459 S.W.2d 166, 167-68 (1970)*. **[*13]** In this Commonwealth, cases utilizing the discovery rule generally involve medical malpractice or product liability issues. The discovery rule has not yet been analyzed in a case similar to the one at hand. Under the discovery rule "'a cause of action will not accrue . . . until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct.'" *Perkins v. Northeastern Log Homes, Ky., 808 S.W.2d 809, 819 (1991)* (citing *Louisville Trust Co. v. Johns-Manville Products, Ky., 580 S.W.2d 497, 501 (1979))*.

While the circuit court did not so specifically state the rule, it indeed applied it in this matter. We believe that in its opinion, the circuit court committed error by stating that "this law is clear that certainty is not required, and the presence or absence of a criminal proceeding or conviction of the defendant has no bearing on the running of the statute of limitations for a civil action based on the same facts and circumstances." On the contrary, there are no Kentucky cases stating this principle in regard to a criminal **[*14]** matter affecting a civil matter.

Further, courts in this Commonwealth have not consistently applied the discovery rule. Some courts have held that, once an injured party has discovered his injury, the statute of limitations is not tolled where a plaintiff has failed to identify or locate potential defendants. See *Simmons v. South Central Skyworker's, Inc., 936 F.2d 268 (6th Cir. 1991)*; *Reese v. General American Door Co., Ky. App., 6 S.W.3d 380, 383, 45 14 Ky. L. Summary 8 (1998)*. However, in *Wiseman v. Alliant Hosp., Inc., Ky., 37 S.W.3d 709, 712 (2000)*, the Court held that to trigger the limitation period one must know: (1) he has

been wronged and (2) by whom the wrong has been committed.

Moreover, because the discovery rule evolved initially under medical malpractice and later was applied to product liability and similar cases, we cannot say that it would also be accurate to expand it to apply in the present matter. However, because we ultimately resolve this matter on other grounds, we will leave resolution of this issue for another time.

Next, in absence of Kentucky cases on point, we analyze what other jurisdictions have done under similar **[*15]** facts.

The Supreme Court of Ohio in *Collins v. Sotka, 81 Ohio St. 3d 506, 1998 Ohio 331, 692 N.E.2d 581 (1998)*, held that a wrongful death claim accrued when the court entered an order sentencing the defendant for the victim's murder. In Collins, the Court held that it was "unwilling to further condone . . . a ludicrous result" where "a tortfeasor need only kill his or her victim and fraudulently conceal the cause of death for two years to be absolved from civil liability." *81 Ohio St. 3d at 511, 692 N.E.2d at 584-85* (citation omitted). Although statutory authority was lacking, the Court thereafter held that:

> In a wrongful death action that stems from a murder, the statute of limitations begins to run when the victim's survivors discover, or through the exercise of reasonable diligence, should have discovered, that the defendant has been convicted and sentenced for the murder.

Id.

Other courts reviewing wrongful death cases involving a murder have tolled the statute of limitations at least until the identity of the murderer was discovered. See *Bennett v. F.B.I., 278 F. Supp. 2d 104 (D. Mass. 2003)*; *Bernoskie v. Zarinsky, 344 N.J. Super. 160, 781 A.2d 52 (2001)*; **[*16]** *Friedland v. Gales, 131 N.C. App. 802, 509 S.E.2d 793 (1998)*; *McClendon v. State of Louisiana, 357 So. 2d 1218 (La. App. 1 Cir. 1978)*. However, in each of these cases, the decedent's estate brought a wrongful death action within the limitation period. None of the courts addressed how they would have resolved the issue had the decedent's estate waited until after conviction before filing a civil action.

The court in *Richards v. LaCour, 515 So. 2d 813 (La. App. 3 Cir. 1987)*, however, did address this issue. It concluded that by the time of the defendant's indictment, the decedent's estate was aware of his identity and should have filed suit within the limitation period.

While we are not bound by the decisions from other jurisdictions, we look to their reasoning for guidance on this issue and find that the primary concern of the courts is that a criminal defendant should not be permitted to hide behind the protection of a statute of limitations defense when his actions resulted in an insurmountable obstacle in the victim's estate timely pursuing civil remedies. Indeed, it does seem absurd that where one has been a "successful" murderer **[*17]** for a number of years, he is provided benefits and arbitrary defenses under the law.

Having reviewed the purposes of statutes of limitations and other jurisdictions' resolution on similar issues, we turn finally to public policy considerations. We conclude that the resolution of this issue must turn on the public policy of this Commonwealth to which we look for guidance from the General Assembly.

We believe that a defined statute of limitations period enacted by our legislature expresses the public policy of this Commonwealth. But there is no such limitation statute enacted by the General Assembly in regard specifically to wrongful death actions. Because our current wrongful death statute has no set time limit, our legislature has shown no public policy on this particular issue.

We are well aware of the previous holding by courts in this Commonwealth that wrongful death cases are governed by the one-year limitation period in *KRS 413.140*; however, the courts have not reviewed this issue in the context of a murder case. We believe that there are different public policy issues in a civil matter such as medical malpractice or product liability cases as compared **[*18]** to a murder case. In the medical malpractice and product liability cases, the statute of limitations fulfills its intended purpose to prevent stale claims and force the plaintiff to use due diligence in discovering the tortfeasor and gathering evidence. It also protects the defendant from being unduly burdened with old claims, advances prompt discovery of evidence to build a defense, and operates to prevent fraudulent claims.

On the other hand, in this matter, these factors are weakened considerably, if present at all. In this case, the claim is already stale due to Shane's skills in carrying out Trent's murder and concealing his involvement in the crime. Had he not informed someone of it, his guilt most likely would have gone undiscovered even yet. Indeed, nothing in the record shows that he was previously a suspect in the case. Shane committed the "perfect" murder for his guilt to go undetected, if there is such a thing.

We also believe that this Commonwealth's public policy is that victims such as the DiGiuro family deserve a remedy. The *wrongful death statute* itself is evidence of this and is remedial in nature. Therefore, it should be

construed to effect its intent. Also, while **[*19]** not relevant to the case at hand, *KRS Chapter 346* evidences our legislature's intent that families of victims of crime be compensated.

Furthermore, delaying the civil matter would not subvert the public policy of resolving claims promptly even after Shane had been named a suspect or after his indictment. Shane cannot complain that the civil matter took him by surprise. While the considerations in a civil and criminal matter are separate, we cannot say that Shane was prejudiced in any way. Moreover, had the jury found him not guilty, this finding would have been beneficial to him in defending the civil action or the civil matter might be dismissed altogether. Alternatively, where a defendant ultimately pleads guilty, he would be hard pressed to challenge a civil matter where the burden of proof is lower.

Moreover, civil matters are routinely and almost exclusively stayed until the criminal matter is resolved. Discovery in the civil matter would in all probability have been stayed as there is a difference between the discovery privileges available to a defendant in each type of case. See *Degen v. U.S., 517 U.S. 820, 825, 135 L. Ed. 2d 102, 116 S. Ct. 1777 (1996)* (citing *Afro-Lecon, Inc. v. U.S., 820 F.2d 1198, 1203-1204 (Fed. Cir. 1987)*; **[*20]** *Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962))*.

> A criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified. *Fed. Rules Crim. Proc. 16(a)(2), 26.2.* In a civil case, by contrast, a party is entitled as a general matter to discovery of any information sought if it appears "reasonably calculated to lead to the discovery of admissible evidence." *Fed. Rule Civ. Proc. 26(b)(1).*

Degen, 517 U.S. at 825-26.

Under the facts of this case, a stay would actually serve the purpose of effective use of judicial resources and time, as well as benefit the parties. Through the resolution of the criminal matter most discovery will take place.

In this matter, we are faced with a set of facts in which enforcing a statute of limitations, not specifically included by the General Assembly in the wrongful death statute, will not result in furthering the purpose of time limitations. Had Trent's estate filed suit in this matter **[*21]** within one year of the discovery that Shane may have been responsible for Trent's death, in all probability, the civil matter would have been stayed pending the outcome of the criminal matter. Hence, the statute of limitations would not operate as it would normally to end litigation and prevent stale claims.

In sum, we conclude that, under the facts of this particular case and in absence of a specific limitation period prescribed by the wrongful death statute, the public policy of this Commonwealth would not be furthered by using the general statute of limitations. Instead, we find that the public policy of this Commonwealth would be furthered by allowing the family of a murder victim to wait until conviction of a defendant before filing suit. There being no statutory authority or binding case law on point, we now hold narrowly that a case involving an unsolved murder has different policy considerations than other wrongful death actions and decline to apply *KRS 413.140*. Accordingly, we reverse and remand this matter to the trial court for proceedings not inconsistent with this opinion.

TAYLOR, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, DISSENTS AND FILES SEPARATE **[*22]** OPINION.

DISSENT BY: BUCKINGHAM

DISSENT:

BUCKINGHAM, JUDGE, DISSENTING. I conclude that neither the discovery rule nor *KRS 413.190(2)* affords the appellant any relief in the determination of whether its complaint was filed within the limitation period. Therefore, I respectfully dissent. Before doing so, however, I feel it is necessary to summarize the salient points of the majority opinion in order that my dissenting views may be properly understood.

Since DiGiuro's death occurred on July 17, 1994, and the civil action was filed on July 1, 2002, the statute of limitation set forth in *KRS 413.140(1)(a)* barred the complaint as untimely unless the appellant could show relief under either the discovery rule or *KRS 413.190(2)*. The majority declines to state whether it believes the discovery rule should be extended to cases of this nature, and the majority does not address *KRS 413.190(2)* in any manner. Rather, the majority decides this case on public policy considerations, states that the victim's family deserves a remedy, and declines to apply the one-year statute of limitation in *KRS 413.140(1)(a)* **[*23]** in any manner. I believe that neither the discovery rule nor *KRS 413.190(2)* save the complaint from being time-barred, and I believe that public policy considerations are generally best left for determinations by the legislature or by our supreme court.

"With the exception of cases involving latent injuries from exposure to harmful substances, Kentucky courts have generally refused to extend the discovery rule without statutory authority to do so." *Roman Catholic Diocese of Covington v. Secter, Ky. App., 966 S.W.2d 286, 288, 45 5 Ky. L. Summary 9 (1998)*. "Kentucky case law has previously limited the extension of the discovery rule primarily to causes of action arising from recovery of stolen property, medical or professional malpractice and latent illness or injury resulting from exposure to harmful substances." *Vandertoll v. Commonwealth, Ky., 110 S.W.3d 789, 796 (2003)*. Furthermore, in *Louisville Trust Co. v. Johns-Manville Products Corp., Ky., 580 S.W.2d 497 (1979)*, the Kentucky Supreme Court agreed that the issue of extending the discovery rule was a matter of policy and that the Kentucky Court of Appeals should not attempt **[*24]** to make new policy. *Id. at 499*.

However, assuming that the discovery rule should be made applicable herein, it would not result in the appellant's complaint being held to be timely filed. In the Johns-Manville case our supreme court stated that "[a] cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct." *Id. at 501*, quoting *Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170, 174 (1977)*. See also *Gray v. Commonwealth, Transp. Cab., Dep't of Highways, Ky. App., 973 S.W.2d 61, 62, 44 13 Ky. L. Summary 8 (1997)*. Assuming the applicability of the discovery rule to the facts herein, the appellant knew that DiGiuro's death may have been caused by the appellee when the appellee was arrested or by no later than the preliminary hearing held on July 19, 2000. The one-year statute of limitation was tolled until no later than that date. Therefore, since the appellant's complaint was filed on July 1, 2002, it would be time-barred even if **[*25]** the discovery rule had applicability. Regardless, the majority opinion does not rest on the discovery rule.

Turning to the applicability of *KRS 413.190(2)*, that statute states as follows:

> When a cause of action mentioned in *KRS 413.090 to 413.160* accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced. But this saving shall not prevent the limitation from operating in favor of any other person not so acting, whether he is a necessary party to the action or not.

Id. The majority made little mention of this statute in its opinion. However, the appellant claims that the statute saves its complaint from being time-barred.

The cause of action herein arose under *KRS 411.130(1)*. In *Conner v. George W. Whitesides Co., Ky., 834 S.W.2d 652, 654, 39 6 Ky. L. Summary 23 (1992)*, the court reaffirmed the applicability of the one-year limitation period **[*26]** in *KRS 413.140(1)(a)* to wrongful death claims. Therefore, since this cause of action is subject to *KRS 413.140(1)(a)*, *KRS 413.190(2)* is also applicable. Pursuant to that statute, the one-year limitation period does not run when the defendant has absconded, concealed himself, or by any other indirect means obstructed the prosecution of the action. See *KRS 413.190(2)*.

Assuming that the appellee absconded, concealed himself, or by any other indirect means obstructed the prosecution of the action, he did so only until he was arrested on July 14, 2000. As of that date, his identity was revealed and the appellant was no longer unable to prosecute a civil action against him. Therefore, since the complaint was not filed until nearly two years after the appellee's arrest, the complaint was time-barred.

The appellant argues that the appellee concealed his identity even after his arrest and that he continued to do so by maintaining his innocence. Therefore, the appellant asserts the one-year limitation period did not begin to run until the appellee was convicted of the crime. Thus, **[*27]** since the jury verdict was rendered on March 27, 2002, and the civil complaint was filed on July 1, 2002, the appellant argues that it was timely filed.

In determining when the statute began to run, we must examine when the appellee was no longer "absconding," "concealing himself," or "by any other indirect means obstructing the prosecution of the action." See *KRS 413.190(2)*. Once the appellee was arrested, he was no longer absconding or concealing himself. Furthermore, before it can be said that the appellee was obstructing the prosecution of the action "by any other indirect means," he must have committed "some act or conduct which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so." *Adams v. Ison, Ky., 249 S.W.2d 791, 792 (1952)*. Also, the appellee's "representation or conduct must have been relied upon reasonably and in good faith and have resulted in prejudice from having refrained from commencing his action within the limitation period." *Id. at 793*. In the case *sub judice*, the appellant knew the appellee's identity once he was arrested

[*28] and charged with the crime. The appellee did nothing to obstruct or prevent the appellant from instituting his civil complaint from that time forward. In short, I conclude that *KRS 413.190(2)* affords no relief to the appellant.

As has been noted, the majority does not base its opinion on either the discovery rule or *KRS 413.190(2)*. Rather, the majority bases its opinion on public policy considerations. The majority acknowledges that wrongful death cases are governed by the one-year limitation period in *KRS 413.140(1)(a)*. See *Conner, 834 S.W.2d at 654*. However, the majority holds that a murder case is different from other wrongful death cases because of different public policy considerations and that, therefore, the one-year limitation period in that statute should have no applicability at all.

I respectfully disagree with the majority's analysis for several reasons. First, since the majority declines to apply the one-year limitation period in *KRS 413.140(1)(a)*, then it apparently holds that there is no statute of limitation applicable to a wrongful death action **[*29]** resulting from a murder. Surely, this cannot be so. Second, public policy considerations are more properly addressed by the legislature or by our supreme court, particularly where statutory law is applicable. Third, I see no reason why a death by murder should be classified differently from any other wrongful death case. In fact, the statute allowing civil actions for wrongful death includes circumstances under which the act was committed by willful conduct. See *KRS 411.130(1)*.

Finally, the majority states that the public policy in this commonwealth is that victims such as the appellant deserve a remedy. I agree. However, I believe the appellant's remedy was to file a civil complaint against the appellee within one year of learning of his identity following his arrest. Its failure to do so rendered its complaint untimely, and the circuit court properly dismissed it as barred by the applicable statute of limitation.

LEXSEE 2005 KY. LEXIS 118

SHANE RAGLAND, MOVANT v. MICHAEL L. DIGIURO, ADMINISTRATOR OF THE ESTATE OF TRENT DIGIURO, RESPONDENT

2004-SC-0560-DG

SUPREME COURT OF KENTUCKY

2005 Ky. LEXIS 118

April 13, 2005, Entered

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: (2003-CA-1555-MR). FAYETTE CIRCUIT COURT. 2002-CI-2669. *DiGiuro v. Ragland, 2004 Ky. App. LEXIS 188 (Ky. Ct. App., June 25, 2004)*

DISPOSITION: Review is granted.

JUDGES: Joseph E. Lambert, CHIEF JUSTICE.

OPINION BY: Joseph E. Lambert

OPINION:

ORDER GRANTING **[*2]** DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is granted. Further briefing shall proceed in conformity with CR 76.12, the Appellant's brief to be filed within sixty days of the entry of this order.

The clerk of the Court of Appeals is directed to transfer to the clerk of the Supreme Court the entire record in this proceeding, File No. 2003-CA-1555-MR.

ENTERED: APRIL 13, 2005.

Joseph E. Lambert

CHIEF JUSTICE